LAW AND CONTEMPORARY PROBLEMS

THE FEDERAL COURTS

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FOREWORD

"The indispensability of the federal judicial system to the maintenance of our federal scheme may be taken as a political postulate."[1] The validity of this postulate has rarely been questioned since 1789, when the First Judiciary Act established, as its "transcendent achievement,"[2] the tradition of a system of inferior federal courts for this country.[3] Still less is it likely to be challenged today, when the federal judiciary enjoys the highest prestige, when federal procedural reform has set an example to be emulated by courts everywhere, and when expanding federal functions have sharply emphasized the necessity of a system of courts to serve both as an instrument of national policy and as a moderator of relations between the nations and the states.

It is significant, however, that this acknowledgment of the indispensability of the federal judicial system was formulated by one of the system's most jealous critics—one who insisted that the specific functions assigned to the federal courts should be subject to continuing scrutiny, and that special care should be taken to protect those courts from "an excess of responsibility which may seriously impair their peculiar federal tasks."[4]

A re-examination in this spirit of the federal judicial system as an institution is particularly appropriate at this time. The opportunity for comprehensive reconsideration does not come often; when it does come, it is usually related to legislative proposals for rather general revision of the jurisdiction and functions of the judiciary.[5] Now the Federal Judicial Code, which dates from 1911, is in process of

[1] Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORN. L. Q. 499, 503 (1928).

[2] FELIX FRANKFURTER AND JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 4 (1927).

[3] Doubts have nevertheless been expressed occasionally, even in modern times. See, *e.g.*, Max Radin, *Courts*, in 4 ENCYC. SOC. SCI. 515, 527 (1931): "The federal judicial system is based upon the premise that the federal judicial power cannot be entrusted to the state courts but requires a separate organization of federal courts. Doubtless no other arrangement was possible at the time when the federal judicial system was inaugurated, since the states and the federal government were too jealous of each other to tolerate a unitary system. But a great deal can be urged against it under present conditions of national unity, and it may well be doubted if it would be adopted now if another federal constitutional convention were to meet."

[4] Frankfurter, *supra* note 1, at 503.

[5] "For forty years [since the Judiciary Acts of 1887-88] there has been no organic reconsideration of the scope of business entrusted to the lower federal courts. . . . But in truth, for more than fifty years there has been no comprehensive revision. For the Act of 1887-88 largely took for granted the jurisdictional assumption which underlay the Judiciary Act of 1875." Frankfurter, *supra* note 1, at 502-503.

revision;[6] so is the Federal Criminal Code.[7] Even though the revision of the Judicial Code is a project of limited objectives, it is an undertaking which calls once again for appraisal of the uses to which we put our unique system of federal courts.

It has been twenty years since a study of such scope and purpose has claimed the attention of American lawyers and statesmen.[8] In those years there have been several developments which ought to be taken into account. Not the least of these is the establishment of an Administrative Office of the United States Courts, which since 1940 has been compiling information of a sort that is prerequisite to adequate statistical analysis of the judicial system. One of the most interesting developments was the Supreme Court's abrogation, in *Erie Railroad v. Tompkins*,[9] of a doctrine which had been thought by some to be a reason for the important jurisdiction of the district courts in suits between citizens of different states, and which certainly appeared to be a reason for the popularity of that jurisdiction.[10] Of greatest importance, however, is the fact that new problems of national life have been reflected in the demands made on the courts and in the roles to which they have been assigned in the functioning of the federal system. LAW AND CONTEMPORARY PROBLEMS therefore presents this group of essays with confidence that "nothing but good can come from a re-examination of the purposes to be served by the federal courts."[11]

BRAINERD CURRIE.

[6] H. R. 3214, 80th Cong., 1st Sess. (1947).

[7] H. R. 3190, 80th Cong., 1st Sess. (1947).

[8] In 1928 the Norris Bill (S. 3151, 70th Cong., 1st Sess.), which would have drastically curtailed the jurisdiction of the district courts, evoked strong protests from bar associations and was perhaps responsible for a historic discussion of federal jurisdiction in the law reviews. See 69 CONG. REC. 8078 (1928) and references in Frank, *Historical Bases of the Federal Judicial System, infra* at 23.

[9] 304 U. S. 64 (1938).

[10] Such evidence as there is, however, fails to show that the *Erie* case has had an appreciable effect on the business of the courts in this category. The best available figures on the use of diversity jurisdiction prior to the *Erie* case are those given in the American Law Institute's STUDY OF THE BUSINESS OF THE FEDERAL COURTS (1934), an analysis of thirteen selected districts for the year 1930. According to that study, diversity cases amounted to 18.4 per cent of all cases (*cf.* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code, infra* at note 91), or 43 per cent of all private cases. The Annual Reports of the Director of the Administrative Office give full information for the years 1940-47. Over that period the number of diversity cases increased from 7254 to 8586. From 1940 to 1946 the ratio of diversity cases to all private cases varied within the narrow range of 50 to 53 per cent, dropping to 44 per cent in 1947. This decline is probably not significant; if the figures for 1947 are adjusted to eliminate portal-to-portal suits, diversity jurisdiction again accounts for 50 per cent of all private cases. The continued attractiveness of the diversity jurisdiction despite the loss of the incentive furnished by *Swift v. Tyson* has interesting implications for a study of the federal courts.

[11] Frankfurter, *supra* note 1, at 499.

HISTORICAL BASES OF THE FEDERAL JUDICIAL SYSTEM*

JOHN P. FRANK†

When James Madison and fifty-four other gentlemen met in Philadelphia in May, 1787, they had a number of questions on their minds more important to them than a federal judiciary. Protection of commerce against disruption by state taxes or regulations, an end to impairment of contracts, a taxing system equal to the public needs, an executive department—these were burning necessities to the fifty-five. Discussion in the country during the period of ratification usually found livelier topics than courts or judges. Indeed, except for a vigorous attack on the lack of a requirement for a civil jury and less ardent attacks on diversity, the judiciary clauses were almost immune from strenuous criticism or discussion.[1]

In short, while there was in 1787 a felt need for a federal judiciary, it was not an overwhelming need. The contract clause had its Shay's Rebellion, the prohibition of state coinage had its state tender laws, the Senate and the House had their Great Compromise, the prohibition on state tariffs had its history of state tariffs.[2] Similarly

*Parts I and II of this essay will briefly synthesize developments which preceded the adoption of the judiciary article of the Constitution. Part III briefly states and explores certain theories, some very tentative, as to the origin of particular jurisdictional clauses. The origins of judicial review are outside the scope of this article. Leading historical works on that subject are CHARLES G. HAINES, AMERICAN DOCTRINE OF JUDICIAL SUPREMACY (1932); CHARLES A. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912); and articles collected in 1 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1-174 (1938).

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[1] There were three principal sources of opposition to the judiciary portions of the Constitution: First, the lack of a guarantee of jury trial in civil cases; second, the provision giving the Supreme Court appellate jurisdiction "both as to Law *and Fact*"; and third, the diversity provisions. Patrick Henry's denunciation of the Constitution for its lack of a civil jury guarantee is typical of countless expressions of that objection. 3 ELLIOTT'S CONSTITUTIONAL DEBATES 514, 545 (1901), hereafter cited as ELLIOTT. The "and Fact" objection was closely related, and was based on the assumption that the Court was thus empowered to ignore if it chose the findings of juries. For example of this fear, see Lee, *Letters of a Federal Farmer*, in PAUL L. FORD, PAMPHLETS ON THE CONSTITUTION 294, 308 (1888). Edmund Pendleton, Chief Justice of the Virginia Court of Appeals, was, in the opinion of Madison and Washington, the most effective supporter of the Constitution in the Virginia convention; ROBERT L. HILLDRUP, LIFE AND TIMES OF EDMUND PENDLETON 280 (1939). Of the "and Fact" phrase, Pendleton said, "Though I dread no danger, I wish these words had been buried in oblivion. If they had, it would have silenced the greatest objections against the section." 3 ELLIOTT 519. The Seventh Amendment was intended to allay the foregoing fears. The many criticisms of diversity jurisdiction were primarily aimed at the fear that litigants would be required to travel great distances and litigate at great expense. See, for example, Lee in FORD, *supra*, at 308. Both Massachusetts and New Hampshire recommended sharp limitations on the diversity jurisdiction. 1 ELLIOTT 322, 323, 326. Yet this discussion must be seen in proportion. 3 CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY (1891) discusses the adoption of the Constitution at length and makes no appreciable mention of the judiciary. Neither does ERNEST W. SPAULDING, HIS EXCELLENCY GEORGE CLINTON (1938), although Clinton was a leading opponent of the Constitution in New York.

[2] One of the many accounts of the Constitution with analyses of these problems is in 1 SAMUEL E. MORISON AND HENRY S. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC, cc. 12 and 13 (1942).

the judicial system is in part the product of single definite episodes, but in part precise causes may never be found because they lie no deeper than the common sense of the Committee on Detail of the Constitutional Convention. In this history it is sometimes easier to find predecessors than origins.

I

THE EARLIER SYSTEMS

A. Colonial General Courts[3]

The thirteen colonies of course had differences in the structure of their legal systems, but certain basic general features stand out. The colonies usually began with a system of complete executive, legislative, and judicial power merged in a central dominant official, as in early Virginia,[4] or group, as in Massachusetts.[5] As pressure of business and the spread of population compelled it, the judicial business fell into specialized hands, and local or regional courts were established. Appeals from local courts to the governor or council or to the colonial legislature were common, with final appeal to the Privy Council.

The justice administered in colonial courts was usually as learned and frequently as pompous as its practitioners could make it. On occasion it was more pompous than learned.[6] A few colonial lawyers studied in England, but only a few, and the largest law library in New York early in the eighteenth century contained 152 volumes.[7] A Maryland court in 1772, overcome with the difficulty of a problem, referred it to those lawyers lounging about the court room for solution,[8] and a traveler in seventeenth-century Virginia noted that "a liberal supply of strong drink often makes Justice nod and drop the scales."[9]

A description of the system in Virginia suggests the commonly met problems.[10]

[3] For a detailed study of court structure in each colony, see ROSCOE POUND, ORGANIZATION OF COURTS 26-90 (1940). The most extensive study of one system is JULIUS GOEBEL AND T. R. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK (1944).

[4] Chitwood, *Justice in Colonial Virginia*, in 23 JOHNS HOPKINS UNIV. STUDIES IN HIST. AND POL. SCI. 13 (1905).

[5] For an account of the Massachusetts system, see WILLIAM T. DAVIS, HISTORY OF THE JUDICIARY OF MASSACHUSETTS 1-175 (1900). Merger of functions is a common aspect of colonial societies which lack enough personnel for divided government or enough business to warrant it. Simultaneously with American development, the same phenomenon was occurring under Dutch rule in South Africa. W. P. M. KENNEDY AND H. J. SCHLOSBERG, THE LAW AND CUSTOM OF THE SOUTH AFRICAN CONSTITUTION 5-8 (1935).

[6] MCMILLEN, COUNTY COURTS OF COLONIAL VIRGINIA 11 (unpublished thesis in Indiana University Library, 1935).

[7] PAUL M. HAMLIN, LEGAL EDUCATION IN COLONIAL NEW YORK 76 (1939). Hamlin, who has written a very interesting description of this subject, says that 236 members of the New York bar before 1815 had studied at the Inns of Court, most of them after the Revolution. *Id.* at 17, 18. Apprenticeship in an English office cost from £200 to £300 for five years. *Id.* at 21 (n. 35), 33.

[8] Nicholson v. Sligh, 1 H. & McH. (Md.) 434 (1772). On the untrained New Hampshire judges, see PAUL S. REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 27, 28 (1899).

[9] MCMILLEN, *op. cit. supra*, note 6, at 12, quoting Colonel William Byrd.

[10] The following two paragraphs are drawn from Chitwood, *supra* note 4, and MCMILLEN, *op. cit. supra*, note 6; GEORGE L. CHUMBLEY, COLONIAL JUSTICE IN VIRGINIA (1938); and WALTER B. RICHARDS, GENESIS OF THE FEDERAL JUDICIAL SYSTEM 15 (Address, Virginia State Bar Association (1904), pamphlet in the Library of Congress).

Justice was originally declared by a Council, replaced in a few years by a Governor. The gross cruelties of administration between 1610 and 1619 by Lord de la Warr and Governor Dale were followed by a transfer of supreme judicial power to the Assembly, where it remained until 1682. Then the legislative judicial authority ended, supplanted by a "General Court" consisting of the Governor and his Council, which he appointed.

Yet from the beginning regional courts were necessary, and the "monthly court" system was created in 1624 and became the county court system in 1643. These courts, composed usually of eight members, decided local cases by majority vote and also had extensive administrative duties, such as making tax assessments, appointing inspectors to receive wolf heads from the Indians for bounty, and fixing prices at local taverns. In the eighteenth century these courts were supplemented by magistrate's courts of single justices to handle cases up to twenty-five shillings. Appeals in civil cases could be taken up the scale of courts and eventually to England if progressively larger sums of money or tobacco were involved. In addition to these three courts, there were also courts of hustings, a court of oyer and terminer, special slave courts, and the Court of the Commissary of the Bishop of London.[11]

Even so brief a sketch as this suggests certain basic features of the early colonial court system: (1) The courts went to the people; (2) courts were part of an amalgamated system of government with no rigid separation of executive, legislative, and judicial functions; (3) the accessibility of particular courts depended in civil cases on the amount involved;[12] (4) the colonists were conditioned to a great number of courts and an elaborate system of appeals.

B. Privy Council

The most significant aspect of Privy Council review of colonial legal problems is that, by virtue of the Council's double jurisdiction, it merged into one body the systems of both judicial and legislative review.[13] It could disapprove of statutes by veto and could also invalidate a colonial statute in the course of deciding a case. A foremost example was the invalidation of the Connecticut intestacy distribution statute because it conflicted with common-law conceptions of primogeniture.[14] The

[11] Chitwood, *supra* note 4, at 70, reports that the Bishop's court had jurisdiction of offenses by the clergy; but this jurisdiction could not have been exclusive, for the church wardens and vestrymen proceeded in general court against a delinquent clergyman who allegedly "cared not of what religion he was so that he got the tobacco, nor what became of the flock so that he could get the fleece." Goodwin v. Lunan, Jeff. Va. Rep. 96, 97 (1771).

[12] In sharp contradistinction to our present federal system, however, appeals also depended primarily on the amount involved.

[13] For discussion, see 1 CHARLES G. HAINES, AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 44-66 (2d. ed. 1932). For extensive studies of the appellate work of the Privy Council, see Hazeltine, *Appeals from Colonial Courts to the King in Council with Especial Reference to Rhode Island*, ANN. REP. AM. HIST. ASS'N 323 (1894); Schlesinger, *Colonial Appeals to the Privy Council*, 28 POL. SCI. Q. 440 (1913); Kellogg, *The American Colonial Charter*, 1 ANN. REP. AM. HIST. ASS'N 187, 267 (1903); 3 HERBERT L. OSGOOD, AMERICAN COLONIES, 18TH CENTURY 304-307 (1924).

[14] An easy-to-read account of the case is JAMES TRUSLOW ADAMS, REVOLUTIONARY NEW ENGLAND, 1691-1776 126-130 (1923).

jurisdictional amount, set at £300 in 1753 in particular types of cases,[15] none the less left the Council with a sizable jurisdiction.

It is the general and unchallenged opinion of scholars that the Privy Council system is a real antecedent of the modern Supreme Court and the modern system of judicial review.[16] Jefferson desired in 1787 that the Supreme Court should be part of a "Council" with a general veto over legislation.[17] Jefferson did not then, of course, anticipate that his views of the judiciary would change when he knew Marshall better, but it may surely be hazarded that he was led to his initial impulse by his acceptance of the Privy Council system.

The Privy Council served a more important function than that of review of legislation. It also heard border disputes between the colonies. In our own placid acceptance of the federal system, we are accustomed to think of state rivalries being settled from year to year on the gridirons of state universities; but in the 1780's unsettled border disputes would have meant war. The Privy Council settled at least nine such disputes,[18] and the removal of its service as arbiter left a void which was filled clumsily under the Confederation and conclusively by the Constitution.

C. Admiralty

It was absolutely imperative that the problems normally decided by admiralty courts be decided by someone, and admiralty courts were among the first established in the colonies.[19] Admiralty courts had begun in England in the fourteenth century, and as early as 1360 Sir John Beauchamp was given authority to try pirates,[20] a problem thereafter existing in both hemispheres.[21] The first admiralty court in North America was established in Newfoundland in 1615 when Sir Richard Whitbourne was given authority as admiral to punish Sabbath breaking, fouling the fairways, and burning forests ashore. The first case in Massachusetts occurred in 1630 when Thomas Moulton, pilot, chose between flogging and a forty-shilling fine for deserting his ship at Plymouth.

In the seventeenth century a system of vice-admiralty courts, dominated by the colonial governors, spread through the colonies. They had then and retained later two primary types of jurisdiction: (1) ordinary marine cases, including wages and

[15] 1 LEONARD W. LABAREE, ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS, No. 453, 325-327, and see 329 (1935).

[16] See, for example, JAMES B. THAYER, LEGAL ESSAYS 1, 3 (1908); 1 HOMER C. HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 155 (1939).

[17] Letter, Jefferson to Madison, December 20, 1787, IV DOC. HISTORY OF THE CONSTITUTION 411 (Dep't State 1905), cited hereafter as DOC. HIST.

[18] Discussed briefly in 1 HOCKETT, *op. cit. supra*, note 16, at 155, and in Sargeant's essay in DUPONCEAU, JURISDICTION 141 (1824).

[19] Two leading studies of colonial admiralty courts are Charles McL. Andrews, *Vice Admiralty Courts in the Colonies*, in DOROTHY S. TOWLE, RECORDS OF THE VICE ADMIRALTY COURT OF RHODE ISLAND, 1716-1752 1-79 (1936); and HELEN CRUMP, COLONIAL ADMIRALTY JURISDICTION IN THE 17TH CENTURY, ROYAL EMPIRE SOCIAL STUDY No. 5 (London, 1931). Other authorities are collected in Hendry Co. v. Moore, 318 U. S. 133, 137, n. 1, and 144, n. 6 (1943).

[20] The references in this paragraph are taken from CRUMP, *op. cit. supra*, note 19, c. 1.

[21] For documents on piracy, see JOHN F. JAMESON, PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD (1923). Pages 190-257, *e.g.*, contain the papers in the case of Captain Kidd.

salvage; and (2) prize cases.[22] However, in the latter portion of the seventeenth century Britain began to enforce her navigation and trade acts against the colonies, a step which led directly to reorganization of the admiralty courts.

In England, forfeitures for violation of revenue or navigation laws were heard not in admiralty, but in Exchequer. Experience in the colonies proved that juries would not convict their fellow colonials in trade cases,[23] and in 1697 the admiralty courts were reorganized to utilize their non-jury procedures in the colonies to enforce the acts of trade. The gubernatorial control was eliminated, and the vice-admiralty courts became Crown courts with added trade jurisdiction.[24]

The result was the emergence of a new type of admiralty court in the colonies from which appeals lay first to the High Court of Admiralty[25] and, near the end of the colonial period, to the Privy Council.[26] Developments in these new courts were not uniform, but they were trending in a distinctly non-English direction, a historical fact to which the Supreme Court has recently failed to give sufficient weight.[27]

The admiralty system retained a qualified popularity in the colonies despite the extreme dissatisfaction with the utilization of those courts for trade control. Efforts made in colonial times to establish juries in admiralty were blocked by the Privy Council,[28] but several of the states during the Revolution did add juries. The real dissatisfaction with admiralty courts, however, was apparently with the law they enforced rather than their procedure, for the attempt to engraft a jury system did not survive the Constitution.[29]

D. The Confederation

The Revolution eliminated those two essential portions of the American legal system which were dependent wholly on England: the Privy Council disposition of cases between states, and the vice-admiralty courts. The latter, particularly in wartime, required a substitute.

The Revolution began under the aegis of the Continental Congress, which was legally no more than a conclave of ambassadors of independent states. One of the

[22] These are discussed extensively in ANDREWS, *op. cit. supra,* note 19, at 24-59.

[23] *Id.* at 74.

[24] For discussion in addition to ANDREWS, see 1 H. L. CARSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 27-38 (1905), hereafter referred to as CARSON.

[25] Thus the High Court of Admiralty had jurisdiction over a class of appeals coming from the Colonies which it could not have heard in cases arising in England. The Vrouw Dorothea (1754), reported in The Fabius, 2 C. Rob. 245, 165 Eng. Rep. 304 (1800).

[26] ANDREWS, *op. cit. supra,* note 19, at 22.

[27] Hendry Co. v. Moore, 318 U. S. 133 (1943), holding that a state court had jurisdiction to condemn a fish net used in violation of state law. It had theretofore been thought that all maritime causes of action in rem must be brought in admiralty.

[28] ANDREWS, *op. cit. supra,* note 19, at 9, 10.

[29] See §9, Judiciary Act, 1789, 1 STAT. 77. It would be interesting to know exactly why juries were considered so unsuitable for admiralty. The Governor of Providence Island (off Nicaragua) recorded in his diary that he stopped jury trials in admiralty there in 1638 because "thes Jurors proved themselves soe absurde and ignorant as sone made me finde the miserie of trialls in these dayes. . . ." JAMESON, *op. cit. supra,* note 21, at 8.

first tasks of these representatives was the creation of a form of government, and the Articles of Confederation were agreed to in Congress in November, 1777, though they were not ratified until 1781.

In establishing a judicial system, the draftsmen of the articles had no North American precedents. The Articles of Confederation of the United Colonies of New England in 1643 had contained a commissioner system which could only by a stretch be called "judicial,"[30] and Benjamin Franklin's Albany Plan of 1754 had no judicial provisions at all.[31] Yet the Confederators had a void to fill.

They wrote into the articles three basic provisions for dealing with judicial problems. The Confederacy was to have authority to punish piracy, quickly delegated to state officials in practice.[32] A court was established to hear appeals in admiralty cases, and an almost incredibly clumsy system for arbitrating interstate border disputes was created which was actually utilized in three cases and which averted real war between Pennsylvania and Connecticut over the Wyoming lands.[33]

The principal national judicial system during the Revolution was in admiralty, an oft-told story. In a word, as American vessels began to take prizes, General Washington found himself seriously distracted from military duties by pleas that he dispose of the booty. In November, 1775, he asked Congress to take steps to have such cases decided, and it immediately called upon the states to create their own admiralty courts with appeals to Congress. The states did so, and appeal cases were heard first by the Congress, later by a standing committee, and finally by the Court of Appeals in Cases of Capture, the first American national court, which functioned in anticipation of and under the Confederation.[34]

This admiralty system was of vital significance in the conduct of the war because it was used to permit both privateers and national vessels to cash out their prizes quickly. Congress established prize agents throughout the colonies to condemn enemy ships in admiralty courts, and occasionally a captain invading an area where

[30] For discussion of the United Colonies, see CHARLES M. ANDREWS, COLONIAL SELF-GOVERNMENT 1652-1689, c. 3 (1904). Article 8 authorized the Commissioners to consult "about free and speedy passage of justice in each jurisdiction to all the confederates equally, . . ." FRANCIS BOWEN, DOCUMENTS OF THE CONSTITUTION OF ENGLAND AND AMERICA 83 (1854); and see also Article 6, *id.* at 82.

[31] The Plan contemplated a Grand Council to govern, inter alia, Indian trade and treaties. BOWEN, *op. cit. supra,* note 30, at 87. For William Penn's plan for union, see BRECKINRIDGE LONG, GENESIS OF THE CONSTITUTION 113-116 (1926).

[32] Article IX granted authority for "appointing courts for the trial of piracies and felonies," a function delegated to the states by the Confederation Congress. 19 JOUR. CONT. CONG. 354 (1912).

[33] Article IX provided that for border disputes Congress was to create a panel of thirty-nine, from which the parties would strike alternately until thirteen were left, from which the panel should be drawn by lot. Professor Jameson has shown that this system was modeled after the English Election Act of 1770. In England the process of selection was known as "knocking out the brains of the committee" because each side sought to eliminate the ablest supporters of the adversary. Jameson, *The Predecessor of the Supreme Court,* in ESSAYS IN CONSTITUTIONAL HISTORY 1 (1889). The border dispute cases, including the Wyoming dispute in which Connecticut enlisted the military aid of the neighboring Green Mountain Boys, are described by Jameson at page 3, and by CARSON, *op. cit. supra,* note 24, at 66-79. Each case is described in 131 U. S., App. 1-lxii (1888).

[34] The leading study on this subject is Professor Jameson's essay, *supra* note 33. See also CARSON, *op. cit. supra,* note 24, cc. 4, 5.

prize agents were unavailable was told to "employ some suitable attorney to libell for" his prizes.[35]

The system worked, but it worked poorly. The Court of Appeals and its predecessors did hear 109 cases.[36] Occasionally state courts decided in favor of state interests and then refused to comply with a congressional reversal.[37] Even more serious, privateers anxious to make profitable captures might seize neutral ships, and an over-zealous capture of two Spanish vessels, brought to a Massachusetts court which would not subject itself to federal review, very nearly cost the colonies the friendship of that important neutral.[38] The experience of the Confederation convinced virtually every conscientious patriot of the 1780's that the admiralty jurisdiction ought to be totally, effectively, and completely in the hands of the national government, and an extended search has not revealed a criticism from any contemporary source of the clause of the constitution granting federal admiralty jurisdiction.[39]

II

THE INFERIOR FEDERAL COURTS

The Constitutional Convention had to decide whether to establish a governmental system fairly clearly divided into basic legislative, executive, and judicial departments or whether to continue the frequent colonial device of amalgamation. The oft-heard theory that the Fathers read Montesquieu, thereby misunderstood the British constitution, and as a result created the tripartite system of government, seems most unlikely.[40] Madison, for example, had systematically studied the governments of the world from earliest times in anticipation of the Convention, and knew perfectly well what he was talking about.[41] The evidence is that on the merits the

[35] This system is fully documented in OUT-LETTERS OF THE CONTINENTAL MARINE COMMITTEE AND BOARD OF ADMIRALTY, 1776-1780 (Paullin ed. 1914), and the quotation is taken from letter to Captain John Barry, Jan. 29, 1778, Vol. I, 198, 199.

[36] 131 U. S., App. xxxv-xlix, lists the cases.

[37] For details see Penhallow v. Doane, 3 Dall. 54 (U. S. 1795) and United States v. Judge Peters, 5 Cranch 115 (U. S. 1809).

[38] 24 JOUR. CONT. CONG. 227, 386 (1922). For account of the Massachusetts practice, see CLAUDE H. VAN TYNE, AMERICAN REVOLUTION 190-192 (1905).

[39] Privateering was a business, and the businessmen became thoroughly dissatisfied with disorderly handling of admiralty cases early in the war. In 1779 sixty-eight of the leading citizens of Philadelphia, including Robert Morris, James Wilson, and Thomas Fitzsimons, who were all to be delegates to the Constitutional Convention, petitioned for a permanent court of admiralty with fixed judges, saying, "In the privateering trade in particular, the very life of which consists in the adventurers receiving the rewards of their Success and Bravery as soon as the Cruize is over, the least delay is uncommonly destructive." Jameson, *The Predecessor of the Supreme Court*, in ESSAYS IN CONSTITUTIONAL HISTORY 24, 26 (1889).

[40] For statements approaching this, see JOHN FISKE, THE CRITICAL PERIOD OF AMERICAN HISTORY 291 (1888); and Sir Henry Maine, in POPULAR GOVERNMENT, says, ". . . neither the institution of a Supreme Court, nor the entire structure of the Constitution of the United States, were the least likely to occur to anybody's mind before the publication of the *Esprit des Lois*." Quoted and discussed in C. ELLIS STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES 185, 186 (1894).

[41] Even though Federalist Paper XLVII makes him look as though he didn't, in respect to Montesquieu. For a critique of the Montesquieu theory, see Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. OF PA. L. REV. 842 (1938). For example of Madison's extensive preparatory analysis before the Convention, see his elaborate memorandum, recopied by Washington for his own use, on contemporary and ancient governments. IV Doc. HIST. 138.

Convention preferred divided authority and that Montesquieu was a good source of rationalization; but the choice when made was defended on the basis of colonial experience, and even so, complete separation was not the prime purpose.[42]

This is apparent in the history of the judiciary. The original Randolph plan provided for "one or more supreme tribunals" and a system of lower courts; but the judges were to be chosen by the legislative rather than the executive branch, and "a convenient number" of them were to participate with the Executive in a "council of revision" to veto acts of Congress. The courts were also to try impeachments.[43]

The disputes of the members of the Convention concerning the judiciary turned on a few questions: Should the judiciary try impeachments (a question not of interest here); how should judges be chosen, how compensated, and how long should they serve; and should there be any lower federal courts? It was accepted without question that there should be a Supreme Court.

The Randolph proposal provided for lower federal courts, and this general principle was tentatively adopted on June 4, 1787, with no substantial discussion.[44] But there was strong sentiment in the Convention to leave all litigation at the trial stage to the state courts, a principle of the competing Paterson plan,[45] and on June 5 Rutledge of South Carolina moved reconsideration of the original decision by which the lower courts had been accepted. To him and to Sherman of Connecticut, appellate review by the Supreme Court was enough to protect the federal interests, and Sherman added that duplicate federal trial courts were too expensive.[46]

Madison opposed reconsideration, arguing that the volume of appeals would be unmanageable and that biased jury verdicts or biased trial court directions would escape any effective appellate review.

Rutledge and Sherman carried conviction to the delegates, and a motion to eliminate lower federal courts carried, five to four, with two states divided. Thereupon Madison and Wilson saw and took the opportunity for seeming compromise which eventually gave them all. The defeated Randolph proposal had required that lower courts be established; Madison and Wilson moved to give Congress the option to establish lower courts. The difference was enough to double the vote for lower courts, and the new resolution was fixed in the Constitution by a vote of eight to two.

The method of appointing judges was similarly the product of compromise. A move for exclusive executive appointment, countered by a move for exclusive legislative selection, resulted in compromise on the Massachusetts system of executive selection with the advice and consent of the Senate.[47] Thus the large states, which saw benefit in purely executive appointment, and the small states, which would have

[42] See Madison's discussion of the state practice in this regard in Federalist Paper XLVII.
[43] 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 20, 21 (1937).
[44] *Id.* at 104, 105.
[45] *Id.* at 244.
[46] The discussion of the reconsideration may be found in *id.* at 124-125.
[47] For discussion, see 2 FARRAND 41-44.

disproportionate representation in the Senate, each had a portion of their way.[48]

Eventual agreement on Article III involved adjustments throughout the article. As a convenience of discussion, the delegates talked about types of courts, methods of appointment or compensation, and jurisdiction separately. Yet they obviously interact. A man's judgment as to structure may be affected by his concept of jurisdiction. The process of the Constitutional Convention brought a review of historical practice, a compromise of conflicting interests and political necessities, and the creation of a genuinely new type of judicial organization.[49]

III

THE ELEMENTS OF FEDERAL JURISDICTION

Jurisdiction posed as many problems as the system itself. For this, too, Randolph and Paterson had answers. The original Randolph plan, which envisioned lower courts, gave jurisdiction which may be summarized as jurisdiction in admiralty, in cases between citizens of different states or foreigners, in cases of federal revenue, in cases of impeachment, and as to "questions which may involve the national peace and harmony."[50] The Paterson plan, assuming appellate jurisdiction only, deleted the diversity jurisdiction in cases of citizens of different states and the "national peace" clause, and added specific reference to treaty cases and federal trade regulation cases.[51] The Convention tentatively gave jurisdiction in revenue, impeachment, and national peace cases and sent the clause to the Committee on Detail to work out the remainder.[52]

The work of that Committee must be seen in relation to the basic general purposes of the Constitution. Those purposes need not be reviewed. Suffice it to say that they included the establishment of a government which could keep

[48] RICHARDS, *op. cit. supra* note 10, at 23.

[49] The establishment of the lower court system was the "transcendent achievement" of the Judiciary Act of 1789. FELIX FRANKFURTER AND JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 4 (1927). After the adoption of the Constitution, the judiciary system was given two major examinations, once in connection with proposed Constitutional amendments, and once in the Judiciary Act of 1789. The history of the Act is told in Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). The principal question to be decided was whether the Congress would take up the option given it to establish lower courts. The Senate attitudes are discussed by Warren at 65-69, and the House attitudes at 123 *et seq.* The Senate debate is unrecorded, and the House debate, though extensive, offers substantially nothing which would illumine the pre-1787 conditions leading to Article III other than the basic sentiment that state courts were untrustworthy, particularly in federal question cases. Warren, 124. The other problem was that of amendments to the Constitution itself. The Fifth, Sixth, Seventh, and Eighth Amendments did affect judicial procedures, but Madison's proposal to avoid "vexatious appeals" by requiring a minimum amount for appeals to the United States Supreme Court was lost. See Madison to Pendleton, Sept. 14 and 23, 1789, V Doc. HIST. 205, 210; Warren, 118-119. In the letter of September 23, Madison reported that others felt that amount was no measure of importance, particularly in constitutional cases. Madison was probably able to accept an opposite point of view because of familiarity with the system of appeals in Virginia and to the Privy Council, described above.

[50] FARRAND, *op. cit. supra,* note 43.

[51] *Ibid.*

[52] The principal references in the Madison Journal are 1 FARRAND 223, 224, 230, 231, 244, 317; 2 *id.* at 41-46, 129 *et seq.*

domestic and international peace and which would give full protection to the property and business interests which for various reasons felt much in need of it. It was clearly contemplated that the judges were to be conservative and sound men of property. That most of the delegates at Philadelphia were such men is old knowledge.[53] They were businessmen and landholders and the lawyers of businessmen and landholders, and they conceived of like men, or indeed of themselves,[54] as judges under the new system. A good share of the judicial business necessarily would concern property interests, and jurisdictional clauses must be considered accordingly.

For convenience of analysis, the nine federal jurisdictional clauses may be viewed, with some overlapping, from three standpoints: (1) an effective national government; (2) international obligations; and (3) the interests of property.

A. An Effective National Government

"The judicial Power shall extend to all Cases, in Law and Equity[55] *arising under this Constitution, the Laws of the United States . . . ; to Controversies to which the United States shall be a Party; to Controversies between two or more States."*

These are the most important jurisdictional provisions of the Constitution from the standpoint of the basic political maintenance of the government. Without them, or some substitute for them—indeed, without any one of them—it may fairly be doubted whether the government could have survived. So much cannot be said of any other jurisdictional clause, with the possible exception of the treaty provision.

For the purpose of this analysis, the "federal question" and "United States party" clauses may be considered together. The basic weakness of the Confederation had been its inability to make and enforce those demands which are the proper prerogatives of government. Article I gave the new Congress power to make demands. Article III gave a method of enforcing them.

The Confederation had no means of participating in either civil or criminal litigation except on the sufferance of the states. The state courts had to settle federal military accounts;[56] only the state courts could punish such offenses as treason;[57]

[53] The leading analysis from this standpoint is of course CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION, c. 5, 73-151 (1935 ed.).

[54] On September 28, 1789, President Washington appointed delegates Wilson, Blair, and Rutledge to the Supreme Court, delegate Bedford to the district court for Delaware, and delegate Read as United States Attorney in Delaware. For Wilson's remarkable application for the Chief Justiceship ("My aim rises to the important office of Chief Justice of the United States"), see 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 33, 34 (1926 ed.).

[55] The inclusion of equity in this fashion is attributed to Connecticut delegate William Samuel Johnson, who had grown attached to that practice in England. GEORGE C. GROCE, WILLIAM SAMUEL JOHNSON 165-167 (1937). It was criticized by the "Federal Farmer" for permitting merger of law and equity powers in one judge, ". . . for if the law restrain him, he has only to step into his shoes of equity and give what judgment his reason or opinion may dictate." PAUL L. FORD, PAMPHLETS ON THE CONSTITUTION 308 (1888).

[56] For discussion of some of these problems, see Sargeant's Essay in DUPONCEAU, JURISDICTION (1824); 1 CARSON, *op. cit. supra*, note 24, c. 7; 22 JOUR. CONT. CONG. 83, 102 (1914); 23 *id.* at 773.

[57] See the numerous treason cases in 1 Dallas. For extensive discussion of the treatment of treason in the Revolution, see Hurst, *Treason in the United States*, 58 HARV. L. REV. 226, 246-272 (1944).

only the state courts could punish theft of federal property or frauds on the government.[58] The Confederation could merely appoint its attorneys to go into state courts.[59]

The sponsors of the Constitution deeply believed that no government could exist without power to enforce its requisitions and its laws.[60] These clauses reflect that conviction.

As for suits between states, no more need be said. From the earliest times to 1787, except for the short period of 1775 to 1781, there had been a method of settling interstate disputes. The jurisdiction formerly in the Privy Council and then in the arbitral commissions of the Confederation was transferred to the new Supreme Court.[61]

B. International Affairs

"... to all Cases ... arising under ... Treaties ... ; to all cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of Admiralty and maritime Jurisdiction."

The Confederation had found itself powerless to conduct the international affairs of the states.[62] It could make agreements, but it could not enforce them. It could not even extend to foreign nations an assurance of protection of their representatives in America. The treaty with Great Britain, particularly in respect to debts payable to British merchants or creditors, was being ignored;[63] and the case of de Longchamps had great potential of national embarrassment.

The Chevalier de Longchamps had a standing grudge against Francis Barbe Marbois, French consul-general at Philadelphia. Epithets at the consulate were followed by blows on the street, and though the French official had the best of the battle, further punishment for de Longchamps was in order. He was prosecuted in Pennsylvania courts and heavily—almost preposterously heavily—sentenced, doubtless more as a menace to relations with France than as a threat to the peace.[64]

[58] See for examples Respublica v. Sweers, 1 Dall. 41 (U. S. 1779) (deputy Commissary-General charged with fraud in connection with army stores); Respublica v. Powell, 1 Dall. 47 (U. S. 1780) (army baker charged with short weighting).

[59] As in the *Sweers* case, cited *supra*, note 58.

[60] Citations would be merely cumulative. The basic social evil to be remedied, as Washington expressed it in a gloomy letter to Madison before the Convention, March 31, 1787, was put thus: "I confess, however, that my opinion of public virtue is so far changed that I have my doubts, whether any system without the means of Coercion in the Sovereign will enforce due obedience to the Ordinances of a general Government without which everything else fails." IV Doc. HIST. 102.

[61] The threat of interstate war and past devices are considered by Hamilton in Federalist Paper LXXX.

[62] The judiciary is discussed from the standpoint of maintenance of international peace in Federalist Paper LXXX.

[63] Wilson discussed the ill consequences of the non-enforcement of the British treaty in the Pennsylvania convention. 2 ELLIOTT 489, 490.

[64] Respublica v. De Longchamps, 1 Dall. 111 (U. S. 1784). The defendant was heavily fined, sentenced to imprisonment for two years, and put on bond in addition. The discussion at 115, 116 shows that France wanted an even more severe penalty. The case is suggestive of the manner in which the United States has on occasion made a small nation eat crow for failing to give adequate protection to an official. *Cf.* the Iranian incident, 18 AM. J. INT'L L. 768 (1924).

None the less, suppose Pennsylvania had not prosecuted. The foreign relations of every state were at the mercy of the one state in which an incident occurred. The Convention was convinced that if foreign officials were either to seek justice at law or be subjected to its penalties, it should be at the hand of the national government. The Supreme Court proceeded immediately to enforce the British treaty,[65] and the lower courts heard numerous cases like that of de Longchamps.[66]

The admiralty and maritime jurisdiction had a double purpose, both international and economic. Admiralty cases might involve the relations of the United States with foreign countries, and the same basic conviction which gave national jurisdiction in respect to treaties and ambassadors required it here. The lines between piracy and privateering were thin, and yet the difference might affect war and peace; and the seizure of the two Spanish ships during the Revolution taught a strong lesson. There were few to contest the argument of James Wilson that admiralty jurisdiction must be wholly national since "it related to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen."[67]

C. Property and Trade

"... to all Cases ... arising under this Constitution, the laws of the United States and Treaties made, or which shall be made ... ; between a State and Citizens of another State; between citizens of different States; between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."

The Constitution, said Hamilton while its ratification was pending, had "the good will of the commercial interest throughout the states which will give all its efforts to the establishment of a government capable of regulating, protecting, and extending the commerce of the Union ... the good will of most men of property in the several states who wish a government of the Union able to protect them against domestic violence and the depredations which the democratic spirit is apt to make on property."[68] Article III was a part of a unified program calculated to enlist the support of "most men of property."

For this purpose the most obvious clause was that giving jurisdiction in federal-question cases. The three central prohibitions of the Constitution from a standpoint of contemporary economic interest were the prohibitions on state impairment of

[65] Ware v. Hylton, 3 Dall. 199 (U. S. 1796).

[66] United States v. Liddle, 2 Wash. 205 (C. C. Pa. 1808); United States v. Hand, *id.* at 435 (1810). This is not to say that the foreign-minister clause was essential to the taking of jurisdiction in cases like that of de Longchamps, since these would become federal questions without that clause under Art. I, §8, cl. 10 (offenses against the law of nations). This is none the less suggestive of the general kind of trouble the delegates had in mind. A typical example of a sort of problem in foreign relations which belongs in federal court, in this case in admiralty, is The Schooner Exchange v. M'Faddon, 7 Cranch 116 (U. S. 1812).

[67] I FARRAND 124.

[68] IV DOC. HIST. 288 (1787).

contracts, state currency, and state tariffs.[69] If a state should violate these prohibitions the courts were to invalidate the violating statutes.[70] In addition, Congress could regulate commerce, and impinging state regulations could be invalidated by jurisdiction granted under the phrase "constitution or laws."

The treaty jurisdiction was an important element of the Constitution viewed either from the standpoint of international affairs or of economic matters. The basic power to make treaties gave rise to fears, notably in Kentucky, that treaties inimical to regional economic interests would be made and enforced.[71] In addition, the phrase giving jurisdiction in cases arising from *"Treaties made,* or which shall be made" torpedoed the hopes of those who desired to avoid the payment of British debts, secured under the Treaty of 1783.[72] Madison said, "The articles relating to Treaties—to paper money, and to contracts, created more enemies than all the errors in the System positive and negative put together."[73]

The remaining clauses can be viewed from many standpoints, and this sketch will deal with three: (1) What was the relation of real property interests to the judicial article? (2) What was the basic purpose of the diversity jurisdiction? and (3) Measured by the use actually made of the federal courts in the period immediately after their creation, what conclusions, if any, can be drawn about the purposes of Article III? For such illumination as it may shed on the other two questions, the third will be considered first.

1. *The federal courts, 1790-1815*

A statistical analysis of the actual operations of the federal courts, even in their infancy, is far from being a fool-proof means of determining their purpose. The Founding Fathers may have made mistakes of judgment about what would prove important, and the growth of the country itself materially affected the business of the courts.

None the less, performance is at least some measure of purpose. It permits the statement of some working hypotheses which, tested against others, may indicate fruitful lines for analysis. For this limited purpose, the following data is offered.

Table 1 gives a jurisdictional and functional analysis for 434 cases reported in the Supreme Court in the years 1790-1815. The sources of the cases and the problems and weaknesses of classification are discussed in the appended note.

[69] These three basic prohibitions are discussed together by Madison in Federalist Paper XLIV.

[70] Discussed by Hamilton in Federalist Paper LXXVIII, in which he analyzes the judiciary as "an essential safeguard against the effects of occasional ill humors in the society."

[71] The argument skillfully made to the delegates from Kentucky at the Virginia convention was that the southern states would never willingly give up the navigation of the Mississippi to the Spanish, while the northern states were indifferent to it. Under the Confederation, southern votes could block such a move, but under the Constitution the southern states might be outvoted. See, for a few of many examples of this discussion, the remarks of Henry at 3 ELLIOTT 151, 152; Lee, *id.* at 182; Grayson, *id.* at 501, 505.

[72] 1 ALBERT J. BEVERIDGE, LIFE OF JOHN MARSHALL 441, 444 (1916).

[73] Madison to Jefferson, October 17, 1788, V Doc. Hist. 85, 86.

TABLE 1

BUSINESS OF THE SUPREME COURT, 1790-1815[74]

JURISDICTION	1790-1800	1801-1810	1811-1815	Total
Original	8	1	0	9
Diversity	18	71	46	135
Admiralty	16	22	46	84
U.S. Civil	3	17	12	32
U.S. Criminal	1	3	2	6
Appeals, state courts	3	7	7	17
District of Columbia	0	79	41	120
Miscellaneous	7	21	3	31
Total	..	..	..	434
ECONOMIC BASE				
Credit (bills, notes, bonds, etc,)	9	30	15	54
Contracts for goods and services	2	13	6	21
Contracts relating to land (sales, rents, mortgages)	4	23	26	53
Controversies relating to public land grants	4	12	9	25
Insurance	0	23	16	39
Maritime				
Prize or salvage	15	26	47	88
Contract (excluding insurance)	1	3	2	6
Collisions	0	0	0	0
Estates	1	10	4	15
Slaves	0	6	2	8
Torts	0	1	0	1
U.S. Civil	3	21	15	39
U.S. Criminal	1	5	2	8
Miscellaneous or unclear	16	48	13	77
Total	..	..	..	434

Table 2 gives a similar analysis of 647 cases reported in the federal circuit courts in the same period.[75]

On the basis of these tables and the underlying study, certain conclusions may be stated:

1. Quantity of cases is not in itself a highly significant measure of constitutional purpose. Else one would be forced to believe that a primary purpose in creating

[74] This table omits those cases reported so briefly that, without the record, not even an intelligent guess can be made as to either jurisdiction or interest. The miscellaneous category includes the few patent cases. The seventy-seven "miscellaneous or unclear" cases in the economic table include sixty-eight cases in which the report is too short to permit a guess at the interest.

Credit cases have been put as a separate category from sales, contracts, and mortgages for two reasons: (1) many of the reports reveal that the suit was on a note, but not what the note secured; (2) in the early economy, with shortage of money and in the absence of corporate stocks and bonds, notes were used as a medium of exchange or for speculation. Hence they represent a separable interest. For a good example of a wandering note, see Steinmetz v. Currie, 1 Dall. 269 (Pa. 1788). The economic table attempts to reach the fundamental interest without regard to form. For example, there are more cases involving government civil interests or maritime interests than actually arise jurisdictionally in that form.

[75] The comments in the preceding note are applicable here. These cases were taken from the following reports: 2-4 Dallas; Brunner; Wallace Sr.; 1-3 Washington; 1 Brockenborough; 1 Peters (circuit); 1 Paine; 1-2 Gallison.

TABLE 2

BUSINESS OF THE FEDERAL CIRCUIT COURTS, 1790-1815

JURISDICTION	1790-1800	1801-1810	1811-1815	Total
Diversity	23	212	133	368
Admiralty	1	23	104	128
U.S. Civil	2	10	37	49
U.S. Criminal	14	23	28	65
Miscellaneous	3	19	15	37
Total	..	..	..	647
ECONOMIC BASE				
Credit (bills, notes, bonds, etc.)	7	45	23	75
Contracts for goods and services	1	29	14	44
Contracts relating to land (sales, rents, mortgages)	7	43	46	96
Controversies relating to public land grants	1	7	1	9
Insurance	2	50	16	68
Maritime				
Prize or salvage	2	17	87	106
Contract (excluding insurance)	0	22	21	43
Collision	0	1	0	1
Estates	0	3	11	14
Slaves	0	2	2	4
Torts	2	4	4	10
U.S. Civil	2	12	38	52
U.S. Criminal	14	23	28	65
Miscellaneous or unclear	5	29	26	60
Total	..	..	..	647

the Supreme Court was to furnish a tribunal for the settlement of cases arising in the District of Columbia.

2. There was, quantitatively, very little immediate need for a Supreme Court in 1787 or for some years thereafter.

3. Many of the large number of District of Columbia cases could have been diversity cases had they arisen elsewhere. Such factors as physical distance probably discouraged the institution of cases in other federal trial courts and certainly discouraged appeals from other federal courts.

4. The number of serious and important federal questions actually considered in the Supreme Court was minute. United States civil and criminal cases were few and, for the most part, trifling. The number of appeals from state courts which could raise serious federal questions was only seventeen in twenty-five years, and while important public questions arose from other sources, they were rare.[76]

5. At the beginning of the period, the principal economic groups involved in litigation, quantitatively at least, were the shipping industry, the holders of bills and notes, and those who dealt in land. However, a new industry, insurance, was on the horizon, and by 1815 furnished an important part of federal work. The

[76] For examples, Marbury v. Madison, 1 Cranch 137 (U. S. 1803), original; Fletcher v. Peck, 6 Cranch 87 (U. S. 1810), diversity.

shipping problems were primarily prize and salvage, although before the end of the period contract cases were appearing; and most of the insurance cases were ship insurance problems. Throughout the period, however, and particularly at the beginning, the international aspects of admiralty were the most important in litigation. Tort cases in diversity were almost nonexistent, as were problems of banks or corporations.

6. In the lower courts the business originated predominantly in diversity and admiralty. Excluding the District of Columbia cases, the principal differences between the two levels of courts in this period were that the lower courts had a somewhat higher proportion of Government business and had received more maritime contract problems other than insurance.

7. The whole federal judicial system from 1790 to 1815 gave almost its entire attention to the settlement of the simplest types of commercial and property disputes. It was, in addition, enforcing some federal statutes, particularly those relating to the shipping embargo and the War of 1812. Over half of the small business of the federal courts could have been handled substantially as well in state tribunals.

2. *Land titles*

Assuming that historians need no longer re-contest the ground which Dr. Charles A. Beard has already won, we may start with a fixed assumption that economic events have a great deal to do with political and constitutional developments. That being so, the relation of land speculation to the Constitution and to the Judiciary Article presents a puzzling problem on which only the most tentative observations can be made at the present stage of research. Yet despite lack of tangible evidence, it would surpass belief that this portion of the Constitution could have been written without consideration of land speculating interests.

In 1787 there were fortunes to be made in buying land cheaply from state or federal governments, bringing in settlers from the East or from Europe, and selling at a good profit. Prior to the Revolution there were ten principal land companies in the colonies, the two best known in our own age being the Ohio Company of 1748, in which George Washington was an active participant, and the Transylvania project, remembered principally because its promoter, Richard Henderson, bought 20,000 acres in Kentucky from the Cherokees at three cents an acre and sent Daniel Boone on his way to legend by making him the explorer of the area.[77]

These concerns knew how to manipulate governments. Frequently they had to.[78]

[77] There has been extensive publication on the land companies. However, a number of writers have become preoccupied with the scandals, and obscured the facts. The leading general work on land policy is BENJAMIN H. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1924), and a good specialized work on this period which analyzes separately each of the ten companies referred to is SHAW LIVERMORE, EARLY AMERICAN LAND COMPANIES 74-132 (1938). Land sales under the Confederation are discussed sedately in PAYSON J. TREAT, THE NATIONAL LAND SYSTEM, 1785-1820 41-66 (1910), and considerably less sedately in AARON M. SAKOLSKI, THE GREAT AMERICAN LAND BUBBLE 1-123 (1932); ALFRED M. CHANDLER, LAND TITLE ORIGINS 72 *et seq.* (1945).

[78] It is principally to the Ohio Company of Associates, which desired to obtain and sell land in Ohio, that credit should go for the Northwest Ordinance of 1787, which established a government for

Administrative officials were cut in when necessary to win official approval.[79] These were big operations, carried on by men of imagination and power. After the Revolution it was no longer necessary for the speculators to deal with a distant England, and they turned their whole attention to the state, Confederation, and national governments.

Within a few years of the Revolution ten more great land companies were formed.[80] Among those interested were many of the principal figures of the Constitutional Convention. The largest of all was Robert Morris of Pennsylvania, who in 1791 owned, among other land interests, 5,300,000 acres in western New York and who may well have been the biggest real estate speculator of all time.[81] Both Morris and his lawyer, James Wilson, were strong Federalist delegates to the Convention from Philadelphia, and Wilson, one of Washington's first appointees to the Supreme Court, was active in the formulation of the judicial portions of the Constitution. Other delegates active in land speculation were Washington and Mason of Virginia, Blount of South Carolina, Carroll of Maryland, Dayton of New Jersey, Fitzsimons and Franklin of Pennsylvania, and at least five others.[82]

Not only were the speculators, or persons interested in speculation, participants in the Convention, but they were in various other ways close to Convention members. One of Washington's principal non-convention advisers, for example, and his first Secretary of War, was General Henry Knox of New York, who in 1791 was one of a group which bought two million acres in Maine at ten cents an acre.[83] The Reverend Manasseh Cutler, preacher, botanist, and businessman, was at the very moment of the Philadelphia Convention engaged before the Confederation Congress in New York in wangling a 1½-million-acre grant for his Ohio Company of Associates. Cutler was compelled to take 3½ million acres more than he wanted, to be divided among persons of influence, in order to get his own grant of 1½ million.[84] While working on his great project in New York he came to Philadelphia and had an extended and congenial visit, including an outing in the country, with Convention delegates Madison, Hamilton, Mason, and Rutledge, among others.[85] He eventually went back to Massachusetts and supported ratification there.

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that area. For one of many discussions, see CHARLES A. BEARD, THE RISE OF AMERICAN CIVILIZATION 510-513 (1935 ed.). The problem is briefly mentioned in FRED RODELL, FIFTY-FIVE MEN 18 (1936).

[79] See, for example, the participation of Lord Dunmore, Governor of Virginia, in the affairs of the Indiana Company, LIVERMORE, *op. cit. supra,* note 77, at 108.

[80] Each is described in *id.* at 133-214.

[81] ELLIS P. OBERHOLTZER, ROBERT MORRIS, PATRIOT AND FINANCIER (1903). On the New York speculations, see SAKOLSKI, *op. cit. supra,* note 77, c. 3.

[82] List taken from CHARLES A. BEARD, ECONOMIC INTERPRETATION OF THE CONSTITUTION, c. 5, and particularly 151. (1935 ed.)

[83] LIVERMORE, *op. cit. supra,* note 77, at 174-177. For an extended statement by Knox to Washington of the former's pre-Convention views, see letter, Jan. 4, 1787, IV DOC. HIST. 58.

[84] For a crisp account of the incident see CHARLES A. BEARD, THE RISE OF AMERICAN CIVILIZATION (1935 ed.). For a leisurely account, the Cutler Diary is fascinating reading. 1 LIFE, JOURNALS AND CORRESPONDENCE OF REV. MANASSEH CUTLER, LL.D. 119-373 (W. Parker and Julia P. Cutler, eds., 1888).

[85] Cutler Diary, *supra,* note 84, July 14, 1787, at 271-279.

Several of the jurisdictional clauses were of actual practical significance to large landholders. The most obvious relevant clause was that granting jurisdiction in controversies "between Citizens of the same state claiming lands under grants of different states," a clause that at least possibly could affect every eastern speculator who held land in Ohio, Kentucky, Tennessee, or Maine—areas soon likely to become new states and to have some notions of their own as to who should own the lands within their borders.[86]

However, the diversity and treaty clauses were the jurisdictional clauses most immediately affecting large landed interests. The wording of the treaty clause determined who should own several hundred thousand acres in the Northern Neck of Virginia; and the diversity clause permitted speculators holding land under state grants to litigate questions of title in federal courts which, it must be remembered, were to be part of a government friendly to "men of property."

The implications of the Constitution for land-holding interests received comparatively little recorded public discussion in the course of ratification of the Constitution. A local appeal to New Hampshire based on the "grants of different states" clause is a rare instance of public attention.[87] In Virginia, however, the ratifying convention did discuss the clauses in relation to the two specific land interests of that state, the Fairfax estate and the Indiana Company. A word must be said as to each.

Lord Fairfax, Washington's friend and neighbor, held title before the Revolution to some 300,000 acres in that northeastern sector of Virginia south of the Potomac known as the Northern Neck. Virginia confiscated interests in these with other royalist lands and parceled some of them out again. Among others, George Mason had a substantial interest in them after the re-shuffling. Mason was one of Virginia's wealthiest men and had been a delegate at Philadelphia but refused to sign the Constitution. With Patrick Henry, he led the opposition in Virginia.[88] The treaty of peace in 1783 promised a return of the confiscated property. The one chance of the Fairfax heirs was that a federal judiciary might enforce that treaty.

Whether the Indiana Company took an active part in the Virginia convention has

[86] This clause seems to have originated in the efforts of Vermont to secure independence from both New Hampshire and New York. Sharp controversies followed Vermont's "declaration of independence" from its neighbors on January 15, 1777, and in 1779, as a result of border controversies, Congress requested the states involved to permit it to resolve disputes arising out of land grants from the different states. For details see 131 U. S., App. 1-liii.

[87] Agrippa (James Winthrop), in PAUL L. FORD, ESSAYS ON THE CONSTITUTION 75 (1892).

[88] See HELEN D. HILL, GEORGE MASON (1938), *passim*, and on his opposition to the Constitution, 213-238. A rather remarkable theory of the reason for the divergence of the Virginia political leaders on the Constitution is offered in an earnestly anti-Constitutional study, Grigsby, *The History of the Virginia Federal Convention*, 9 VA. HIST. SOC. COLLEC. 42, n. 48 (1890): Washington, Pendleton, Wythe, and Madison were the strongest supporters of the Constitution. If one looks to unconscious guiding factors "it may be said that they were all men of wealth, or held office by a life tenure, and that, though married, neither of them ever had a child. In the same spirit it may be mentioned that Mason and Henry were men of large families, and that hundreds now living look back to 'Gunston Hall' or 'Red Hill.' In the case of Henry, the cradle began to rock in his house in his eighteenth year, and was rocking at his death in his sixty-third."

not been traced, but it had probably the largest immediate stake in the adoption of the Constitution of any business enterprise existing in 1787. In 1768, after the most elaborate negotiations, the Indiana Company "bought" from the Indians of the Six Nations 3½ million acres of land in what is now West Virginia. Between 1776 and 1779 the issue of title was fought out with Virginia. Mason led the opposition and Edmund Randolph represented the company before the Virginia assembly in those years. Mason prevailed and the company seemed lost. Meanwhile many Virginians settled in the claimed area.[89]

Mason's attack on the judiciary sections at the Virginia convention was specific and candid. He could not vote for the Constitution so long as the judiciary clause stood as it was. He reminded his listeners that his own pecuniary interests demanded the non-enforcement of the Treaty of 1783. If it were ever enforced, he conceded, his own interests in the Fairfax land would be adversely affected.[90] In addition, he argued, the Constitution would give the Indiana Company an opportunity to reassert its claim before the federal courts, and therefore the residents of the area involved should oppose the Constitution if they did not want to pay tithes to the Indiana Company.[91] He proposed an amendment that the federal judicial power should apply only to such causes of action arising *after* the adoption of the Constitution.[92]

Marshall and Randolph, among others, answered that Mason's fears were groundless because the federal judiciary would respect the Virginia determination on the Indiana Company; and that if the Fairfax heirs were entitled to the land, they should have it.[93]

Mason's predictions were shrewd. Within a few years Marshall became counsel for the Fairfax interests, and eventually, financed by Robert Morris, a Marshall syndicate bought the property.[94] The Supreme Court upheld the Fairfax-Marshall title.[95] The Indiana Company did sue Virginia in the United States Supreme Court, which took jurisdiction.[96] Thereupon Virginia and Georgia, concerned because of

[89] For an extended account of these affairs see GEORGE E. LEWIS, THE INDIANA COMPANY, 1763-1798 (1941). Failing in Virginia, the company appealed to the Confederation Congress, hiring Thomas Paine as its propagandist for 300 shares. Paine wrote a pamphlet in support of the company entitled "Public Good." These latter incidents are described in MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 121 *et seq.*, 218, 233 (1940).

[90] "I am personally endangered as an inhabitant of the Northern Neck. The people of that part will be obliged, by the operation of this power, to pay the quitrent of their lands. Whatever other gentlemen may think, I consider this as a most serious alarm." 3 ELLIOTT 528.

[91] *Id.* at 529.

[92] *Id.* at 530.

[93] *Id.* at 559, 574. Beveridge notes that Marshall himself "was then personally interested in the Fairfax title," and adds, "His own and his father's lands in Fauquier County were derived through the Fairfax title." 1 BEVERIDGE, *op. cit. supra*, note 72, at 448. Randolph, formerly counsel for the Indiana Company, assured the delegates that in the future "the remedy will not be sought against the settlers, but [against] the state of Virgina." 3 ELLIOTT 574.

[94] The transaction is described in 2 BEVERIDGE, *op. cit. supra*, note 72, at 199-211.

[95] Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603 (U. S. 1813); Martin v. Hunter's Lessee, 1 Wheat. 304 (U. S. 1816).

[96] Grayson v. Virginia, 3 Dall. 320 (U. S. 1796).

Chisholm v. *Georgia,* allied in writing the Eleventh Amendment and sovereign immunity into the Constitution, and the Indiana Company's claims were finally dismissed.[97]

As Tables 1 and 2 show, there is record of nine cases in the lower court reports and twenty-five in the Supreme Court involving interests in public lands between 1790 and 1815. Most of these were small affairs, quarrels over soldiers' bounty land, for example. But some were important. The Fairfax estate case, arising as a federal question based on the treaty clause, has been mentioned. *Fletcher* v. *Peck,*[98] a feigned case brought in diversity to settle the title to the Yazoo lands in Georgia, is well known. Another was *Fitzsimons* v. *Ogden,*[99] in which, in an extremely complicated situation, Gouverneur Morris, a delegate at Philadelphia, emerged triumphant with the stupendous remnant of Robert Morris' fallen estate. The case arose in diversity and involved no federal question. The Court found that G. Morris had been "unkind" but not fraudulent to the R. Morris interests.

Other land company cases were *Huidekoper's Lessee* v. *Douglass,*[100] a case which may also have been carefully arranged to put it into diversity. The issue was whether the Holland Company, purchaser of hundreds of thousands of acres from Pennsylvania, should lose title for failure to give full compliance with its contract. Marshall's language in deciding this non-federal question is revealing of the Court's essential spirit of friendliness to the land companies.[101] In *Pendleton and Webb* v. *Wambersie,*[102] the Court in kindly fashion lent federal jurisdiction to untangling the affairs of a land company which had stretched its shoe string beyond the breaking point, and in *Town of Pawlet* v. *Clark*[103] it gave full—and logical—scope to the clause concerning grants from two states.

This much of a hypothesis is offered for further exploration: A large commercial interest in the country and in the Convention in 1787 was that of the existing or immediately impending land companies. The judiciary article was specifically discussed in terms of land speculations at least in Virginia. The Supreme Court aided virtually every land speculator who came before it from 1790 to 1815,[104] and the federal jurisdictional clauses and particularly the diversity clause gave most material assistance for that purpose. In all probability the drafters at Philadelphia, or at least some of them, had some such benefits in mind as one of the factors influencing their drafting of Article III.

3. *The diversity jurisdiction*

The most obvious explanation of the two clauses in Article III giving jurisdiction

[97] Hollingsworth v. Virginia, 3 Dall. 378 (U. S. 1798). For an analysis of this litigation, and the steps taken by Virginia, see LEWIS, *op. cit. supra,* note 89, at 277-291.

[98] 6 Cranch 87 (U. S. 1810).

[99] 7 Cranch 2 (U. S. 1812).

[100] 3 Cranch 1 (U. S. 1805).

[101] *Id.* at 70-71.

[102] 4 Cranch 73 (U. S. 1807).

[103] 9 Cranch 292 (U. S. 1815).

[104] Except for George Mason. Had he lived, his cup of misery would have run over when he lost title to 8300 acres of land in Kentucky on the ground of improprieties in his survey. Wilson v. Richard Mason, devisee of George Mason, 1 Cranch 45 (U. S. 1801).

in private cases in which one party is not a citizen of the state in which the suit is brought is the explanation most often given: the drafters of the Constitution thought either that justice or the important appearance of justice would be denied if such cases were left to state decision. So Marshall early declared.[105]

But the brilliant article by Mr. Friendly in 1928[106] and the forceful statement by then Professor Frankfurter,[107] based in part on the Friendly researches, casts grave doubts on the accuracy of the obvious. Their publications and the firm response of Professor Yntema and Mr. Jaffin leave the reason for diversity a matter of sharp disagreement.[108]

The Friendly-Frankfurter position in rough summary may be put thus: An examination of available records, particularly decisions of state appellate courts before 1787, does not show any record of bias of state courts in favor of their own. The records and debates at Philadelphia and in the states show no evidence of a conviction that such bias existed, for not one speaker made a clear statement to that effect. Those debates do show that support for diversity jurisdiction, even among its friends such as Wilson and Marshall, was "tepid," and that it was based essentially not on fears of *regional* bias but on fears of *class* bias: *e.g.*, that in a vague but real sense the drafters of Article III thought that the federal courts would counterbalance the spirit of paper money and debt relief in state legislatures.[109] Actual local hostility, says Friendly, "had only a speculative existence in 1789."[110]

To this Yntema and Jaffin say, essentially, "Unproved." There are too few recorded cases to measure actual hostility, they say;[111] and the absence of discussion in 1787 and 1788 may mean merely that it was impolitic and unnecessary to attack state judges.[112] From the records they extract phrases which indicate there was actual hostility.[113] However, the essential bulwark of this position—which, it must be emphasized, they do not contend they have proved—is that it is incredible

[105] The Bank of the United States v. Deveaux, 5 Cranch 61, 87 (U. S. 1809). For fuller statement of this view, see JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 629 *et seq.* (1833).

[106] Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

[107] Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499 (1928).

[108] Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. OF PA. L. REV. 869 (1931).

[109] "The available records disclose no particular grievance against state tribunals for discrimination against litigants from without. The real fear was of state legislatures, not of state courts." Frankfurter, *supra* note 107, at 520.

[110] Friendly, *supra* note 106, at 510.

[111] Yntema, *supra* note 108, at 876, n. 13.

[112] *Id.* at 875, n. 13. If, for example, the hypothesis advanced earlier of relation of land interests to the judiciary is sound, it is easy to believe that in 1787 as at some other times politicians were not talking about all the subjects they were thinking about. Madison wrote Hamilton as follows during the Virginia consideration of the judiciary: "The attacks on it [the judiciary] have apparently made less impression than was feared. But they may be secretly felt by particular interests that would not make the acknowledgment, and wd. chuse to ground their vote agst. the Constitution on other motives." Letter, June 22, 1788, IV DOC. HIST. 745.

[113] Yntema, *supra* note 108, at 876, n. 13.

that in the narrow, provincial, petty spirit of inter-colonial relations, there should not have been local bias in the administration of justice.[114]

Both positions carry persuasion despite apparent conflict. On the one hand it is incredible that the colonies should have administered justice with complete fairness to each other. On the other hand, it is true that there was very little concrete evidence of hostility in specific lawsuits. The evidence does show that in 1787 bias in interstate lawsuits was more an anticipated than an existing evil.

The explanation of the paradox of inevitable bias and yet no bias lies in the character of pre-1787 litigation. In the first place, there is some record of actual bias, intra-empire if not interstate. There can be no doubt, for example, of direct bias in the administration of justice against British creditors in Virginia. There in 1770 the jurisdiction of the Court of Hustings at Williamsburg, in which creditors had previously proceeded, was sharply constricted for the purpose of putting creditors at the mercy of county courts which could be relied upon to make debt collection difficult.[115] The purpose was contemporaneously so understood.[116] Similarly at least two of the state judgments in admiralty cases between 1777 and 1786 were probably products of bias in favor of state interests.[117]

And yet the problem was not an acute one in 1787 for reasons going to the nature of the domestic economy of the colonies and states. There was too little significant interstate business litigation to give room for serious actual abrasion.

Table 3 analyzes 554 reported cases in seven colonies and states from 1658 to 1787. These are substantially all available reported cases.[118] The table cannot be accurate, for in too many cases one can at best make a good guess as to whether a case was of local or diverse origin. Many doubts were decided in favor of listing the case in diversity.

These data and the underlying cases indicate that the volume and certainly the proportion of interstate *commercial* litigation were extremely low. This is indicated by several factors: (1) A higher proportion of diversity than of local cases must have been appealed or come into the reports, because such cases would have to be of at

[114] The conviction that "the theory of no local prejudice is presumptively improbable" is stated and documented in Yntema, *supra* note 108, at 876, n. 13.

[115] 8 Henning (Va. Stat.) 401, 402.

[116] John Tazewell, Williamsburg attorney, wrote his client, John Norton, English merchant, on July 12, 1770: "If this Law is not disallowed, Creditors for the recovery of their Debts must either bring their Suits in the General or County Courts where Years must elapse before an unjust or unwilling debtor can be brought to Justice." Quoted in GEORGE L. CHUMBLEY, COLONIAL JUSTICE IN VIRGINIA 148, 150 (1938), as part of a general discussion of this subject. English agents charged the purpose of the change of jurisdiction was to make debt collection difficult, and Chumbley concludes, "An unbiased study of the matter indicates that they were right in their conclusions." *Id.* at 148.

[117] For details see Penhallow v. Doane, 3 Dall. 54 (U. S. 1795), and United States v. Judge Peters, 5 Cranch 115 (U. S. 1809).

[118] These cases are taken from Kirby and the Acorn Club Kirby Supplement of 1933 (Conn.); 1 Harris & McHenry (Md.); Quincy (Mass.); 1 Martin (N. C.); 1 and 2 Dallas (Pa.); 1 Bay (S. C.); Jefferson and 4 Call (Va.). It cannot be too strongly emphasized that these records are in such form that the listings are very nearly guesswork. A large number of cases on which not even a guess could be made are omitted.

TABLE 3

DISTRIBUTION OF LOCAL AND DIVERSITY CASES, COLONIAL AND STATE COURTS, 1658-1787 (SCATTERED REPORTS)

STATE	LOCAL ORIGIN	DIVERSE ORIGIN
Connecticut	192	26
Maryland	136	6
Massachusetts	67	2
North Carolina	4	1
Pennsylvania	74	13
South Carolina	28	6
Virginia	38	1
	539 90.74%	55 9.26%

least some importance to be worth bringing in the first place. It is probably safe to assume that if from these sources we find 9.26 per cent of the cases in diversity, the actual proportion was far lower. (2) Many of these cases were not interstate cases, but English-state cases. In the six Maryland diversity cases, for example, four probably involved English interests.[119] (3) Of the American cases remaining after the English cases are eliminated, few involved commercial problems. The credit cases were with England. In South Carolina, for example, one of the diversity cases involved a drunken brawl and another involved slave stealing.[120]

To understand the judiciary of 1787, one must of course understand the country, and the country was growing and changing so quickly that the commercial America of 1800 was substantially different from the commercial America of 1780. When the Constitution was drafted the underlying economic developments which we assume when we speak of diversity jurisdiction today had barely begun to exist. First, there was substantial interstate and intercolonial trade in the period before 1780, but both in volume and in dollar value it was less significant than the West Indian trade or the European trade.[121] Second, the intercolonial trade was predominantly of a very

[119] Hyde & Co. v. Bradford's Ex., 1 H. & McH. 82 (Md. 1730); Brent's Lessee v. Tasker, *id.* at 89 (1737); Black v. Digges's Ex., *id.* at 153 (1744); Burk v. M'Clain, *id.* at 236 (1766). The last case discusses the relation of various problems of debt collection to convenience of trade between England and Maryland.

[120] Genay v. Norris, 1 Bay 6 (S. C. 1784); Porter v. Dunn, *id.* at 53 (1786 or 1787).

[121] It is extremely difficult to find statistical analyses of early trade, because not enough statistics were kept. The first important contemporary statistical study of trade is TENCH COXE, A VIEW OF THE UNITED STATES (1794). Coxe was Commissioner of Revenue. However, most of his data begins about 1790, and he has more data on exports and imports than interstate trade. A statistical reconstruction has been done in the Carnegie Institution publication by EMORY R. JOHNSON and others, HISTORY OF DOMESTIC AND FOREIGN COMMERCE OF THE UNITED STATES (1915). The materials vol. 1, 112-121 and 162-174, and particularly the analysis at 171, with tables, present the best picture of trade. Other significant studies are TIMOTHY PITKIN, A STATISTICAL VIEW OF THE COMMERCE OF THE UNITED STATES (1835); and two Columbia University studies, ROBERT A. EAST, BUSINESS ENTERPRISE IN THE AMERICAN REVOLUTIONARY ERA (1938), and MICHAEL KRAUS, INTERCOLONIAL ASPECTS OF AMERICAN CULTURE ON THE EVE OF THE REVOLUTION (1928). The German pamphlet, SHIRACH, HISTORISCH-STATISTICHE NOTIZ DER GROSSBRITTANISCHEN COLONIEN IN AMERIKA (Frankfurt and Leipzig, 1776), has the advantage of contemporaneity although its author had not been in the Colonies.

local variety. Thus New York was the harbor for New Jersey and Connecticut, and Philadelphia shipped the produce of Delaware.[122] The national business enterprise of the sort that now utilizes diversity jurisdiction did not exist. In 1780 the colonies had no banks, and, as Tables 1 and 2 show, the insurance business had scarcely begun to affect litigation.[123] Though land speculation was large business, its days of big litigation were largely in the offing. Third, interstate transactions were principally on a barter, paper-money, or very short-term basis. There was credit in the colonies both before and after the Revolution, but it was credit from England.[124]

Thus the actualities of trade coupled with the record of litigation combine to give this description: There was very little commercial diversity litigation among the colonies prior to 1787. What there was arose largely within confined marketing districts in which economic lines deviated slightly from state lines. National commercial litigation involving far-flung interests was around the corner after the Revolution. The cotton gin and the first cotton mill, large-scale banking and large-scale insurance were still in the future in 1787. There was some, but only a little, pre-Revolutionary hostility in litigation to the commercial interests of other states, but this may well have been because the occasion for hostility rarely arose. The typical case was still *A* v. *B* for a cow.

To this point, the subject of diversity has been approached as though there were a rational distinction between anti-British-creditor hostility and interstate hostilities.

[122] This is not to say that there was no long-distance intercolonial trade. Boston and Newport merchants traded all over the coast, JOHNSON, *supra* note 121, at 170; and products such as paper and books went from Philadelphia to the South. See Hanna, *The Trade of the Delaware District Before the Revolution*, 2 SMITH COLL. STUDIES IN HIST. 241-245 (1916-17), for a statement of the nature of trade districts, and *id.* at 261 *et seq.* on trade from Philadelphia to the South. But Hanna concludes that the West Indian trade was "the basis of the commercial life of this district."

Some colonies had a higher proportion of intercolonial trade than others because they were in marketing districts pivoting on neighboring cities. New Hampshire, New Jersey, Connecticut, and Delaware are examples. JOHNSON, *op. cit. supra*, note 121, at 168. It will be noted from Table 3 that Connecticut had an unusually large proportion of diversity cases, analyzed by Friendly, *supra* note 106, at 493, 494. It is doubtless no accident that the one concrete example Madison gave the Virginia convention of the necessity of diversity jurisdiction was that "before the war, New York was to a great amount a creditor of Connecticut. While it depended on the laws and regulations of Connecticut, she might withhold payment. *If I be not misinformed, there were reasons to complain.*" 3 ELLIOTT 535 (italics added).

[123] The Bank of North America, a Morris enterprise but with national participation, was founded in 1781. The Bank of New York and the Massachusetts Bank followed in 1784. A second series of banks began shortly after the adoption of the Constitution. For discussion see EAST, *op. cit. supra* note 121, c. XIII, Commercial Banks, 1781-92. Small insurance offices began in New York and Philadelphia about 1760 and began to achieve importance during the war; *id.* at 69-71. By 1834, there were 503 banks with a capital of $203,000,000; PITKIN, *op. cit. supra*, note 121, at 460.

[124] Colonial credit and investment practices showing that credits were scattered but not unknown are described in EAST, *op. cit. supra*, note 121, at 15-23. But as Franklin said in his Address on a Commercial System, May 11, 1787, "In this country the consumer's money follows the delivery of the manufacture, therefore less capital is required." COXE, *op. cit. supra*, note 121, at 19. He also refers to European credit, speaking of "the prodigious credit there given to our merchants on the return of peace." *Id.* at 26, 27. As JOHNSON, *op. cit. supra*, note 121, at 126, puts it, ". . . American commerce, not only in colonial times but after the Revolution, was carried on very largely by the aid of British capital. There was a scarcity of capital in America, and merchants in the United States traded with British merchants whose supply of capital enabled them to extend the necessary credit to American traders after, as well as before, 1783."

For the post-1763 period of strain between the colonies and England, this distinction is sensible; but in earlier periods there was no anti-British-creditor sentiment which could not just as well have been anti-Philadelphia-banker sentiment had there been Philadelphia banks. The Philadelphia Convention dealt with both together by providing federal jurisdiction both for the extra-state suitors and the extra-national suitors. Madison said in the Virginia convention, speaking of local courts, "We well know, sir, that foreigners cannot get justice done them in these courts, and this has prevented many wealthy gentlemen from trading or residing among us."[125] He and his colleagues obviously thought of national and international diversity together.

The real key to the diversity clause lies in the optimism of the founders, an optimism which escapes the label "fantastic" because the dreams so often came true. The members of the Convention did a great deal of anticipating, and on many subjects besides diversity jurisdiction. They anticipated manufacture and trade within the United States on an unknown but vast scale. One of the principal objects of the Convention was to open a path for that expansion.[126] If Robert Morris could buy five million acres of New York, he could anticipate gigantic interstate trade. If the Founding Fathers could anticipate the industrial and commercial revolution, already beginning, they could anticipate some of the obstacles to the success of the concomitant business enterprise. The diversity clauses were based on that dual anticipation more largely than on experience. Actual experience in quantity was lacking because the economic order necessary to that experience had not yet come fully into existence.

At the same time there was an independent but related factor of judgment that the federal courts would be more sympathetic to business interests than the state courts. There was probably a sentiment that land investments would be safest in the hands of federal judges. It is unnecessary to restate here the materials covered by Friendly. Suffice it to say that independent reexamination of the subject results in the conviction that one heavy factor in establishing diversity jurisdiction was the consideration of the comparative class bias of the two systems.

There was probably a third factor of efficiency. Poorly paid, short-term state judges were, in the minds of the Philadelphia Convention, sometimes incompetent and inept.[127]

[125] 3 ELLIOTT 583.

[126] In studying the Constitution it should never be forgotten that its first object was to promote commerce. The delegates originally gathered at Annapolis were directed "to take into consideration the trade and commerce of the United States; to consider how far a uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony." 1 ELLIOTT 117.

[127] Madison speaks of the "tardy, and even defective, administration of justice . . . in some states." 3 ELLIOTT 533. The foregoing discussion in this article shows that on occasion the state courts were not efficient. Irritated counsel in Brown v. Van Braam, 3 Dall. 344, 350 (U. S. 1797), said, "If, disdaining to sanctify the errors of clerks, and the blunders of yearlings (to whom too often the business of keeping and making up a record is confided) the Federal Courts should discountenance and reject the errors and irregularities of the practice of the State Courts, every suitor would gratefully acknowledge

To summarize, the diversity jurisdiction in the federal Constitution may fairly be said to be the product of three factors, the relative weights of which cannot now be assessed:

1. The desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common-sense anticipation.

2. The desire to permit commercial, manufacturing, and speculative interests to litigate their controversies, and particularly their controversies with other classes, before judges who would be firmly tied to their own interests.[128]

3. The desire to achieve more efficient administration of justice for the classes thus benefited.

IV

CONCLUSION

In the history of federal jurisdiction and federal courts, many questions remain unanswered: If Madison and Wilson had not devised their "Great Compromise" at Philadelphia, would we today be without lower federal courts? If it had not been for the necessity of settling international admiralty disputes, would either the Convention or the Congress of 1789 have created a federal lower court system? In other words, is the domestic federal legal system predominantly a byproduct of our international relations? Why—a mystery truly dark—why did the Congress of 1789 provide that appellate jurisdiction should be sufficient in federal question cases while there should be trial court jurisdiction in diversity cases? Why diversity at all? What is the relationship of particular economic interests to Article III? But enough of such a list; there is sufficient mystery left in the origins of the federal judiciary to keep a good many researchers busy for a long time.

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the obligation." In 1801 Hamilton, reviewing all the reasons for establishment of a federal judiciary, spoke of state courts "so constituted as not to afford sufficient assurance of a pure, enlightened, and independent administration of justice." 7 HAMILTON, WORKS OF HAMILTON 764 (1851). (The phrase is of course ambiguous and was written in a new controversy, but the whole essay of which it is a part coincides to a considerable extent with Madison's clause-by-clause analysis, 3 ELLIOTT 531-534.)

[128] The spirit desired is well indicated in the instructions of Justice Patterson to a jury while on circuit in Van Horne's Lessee v. Dorrance, 2 Dall. 304, 310, 311 (U. S. 1795). The right of acquiring, possessing, and protecting property is spoken of affectionately as natural and inalienable. Indeed, said Justice Patterson, "It is sacred." As a critic of the judiciary system put it, "The few, the well born, &c. as Mr. Adams calls them, in judicial decisions as well as in legislation, are generally disposed, and very naturally too, to favour those of their own description." Lee, *Letters of a Federal Farmer*, in PAUL L. FORD, PAMPHLETS ON THE CONSTITUTION 316 (1888).

FEDERAL COURTS IN FOREIGN SYSTEMS*

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An institutional study of the federal courts in the United States may well profit from a survey of such courts in foreign federal systems. While such an undertaking must remain cursory and general, it may nevertheless furnish useful data for a better evaluation of the advantages and shortcomings of the national arrangement and for a clearer differentiation between the intrinsic and the accidental difficulties which have arisen.[1]

The scope of the present investigation is limited to foreign federal governments which are of a comparable civilization and which have not been disrupted as a consequence of the war or political strife. Thus, Germany,[2] Austria,[3] India,[4] and the Ma-

* Professor Riesenfeld is responsible for the discussion of the federal courts in the countries other than the U.S.S.R. He wishes to express his gratitude for the great assistance and hospitality which he received from the law libraries of Harvard, Yale, and Michigan during the collection of the materials and to acknowledge his indebtedness to Mr. W. Kraker for valuable help in the final preparation of the manuscript.

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[For typographical reasons, accents are omitted in references in this article to foreign-language treatises. *Ed.*]

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[1] See Gutteridge, *The Province of Comparative Law*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, ESSAYS IN HONOR OF ROSCOE POUND 303 (1947).

[2] Under the Weimar constitution, 1919, before the advent of Hitler, the principal court of the republic was the Reichsgericht. It exercised mainly appellate jurisdiction, but possessed original jurisdiction over the crime of treason. Appeals could be based on any erroneous application of federal or, with certain restrictions, state law. As a result the court was an enormous body, heavily overburdened, and sometimes having more than ninety justices. See Gerichtsverfassungsgesetz, 1877, §123 *ff;* Zivilprozessordnung, 1933, §549; Simons, *Reichsgericht,* 5 HANDWÖRTERBUCH DER RECHTSWISSENSCHAFT 1 (1928). Affiliated with the Supreme Court were a Supreme Labor Court, organized under the Arbeitsgerichtsgesetz, 1926 (Reichsgesetzblatt I, 507), and a Federal Court for Constitutional Litigations to settle controversies between the states or the states and federal government, and between public officials within a state. Constitution, Art. 108, and Statute of 1921 (Reichsgesetzblatt, 905). In addition there existed separate tax tribunals topped by the Supreme Finance Court, established under the Revenue Act of 1931 (Reichsgesetzblatt I, 161) and several specialized administrative tribunals. At present Germany still exists as an international entity. See R. v. Bottrill, [1946] 1 All Eng. 635 (K.B.D.), Clark v. Allen, 67 Sup. Ct. 1431 (U. S. 1947). Prussia, however, was dismembered. Law No. 46 of the Allied Control Council (Feb. 25, 1947). The ordinary courts of justice, administrative courts and labor courts, have been reestablished in the Länder by Laws Nos. 4, 21, and 36 of the Control Council; the Reichsgericht as a centralized institution, however, has apparently not been restored.

[3] In Austria under the federal constitutions of 1920 and 1934 the whole administration of justice in the eight Länder was national. Constitution, 1920, Arts. 10(6), 82, 83; Constitution, 1934, Arts. 34(1,6), 98-107.

[4] British India received a federal constitution in 1935 by virtue of the Government of India Act, 26 GEO. V, c. 42, and 1 EDW. VIII, c. 2, which, however, went only partially into operation. The Government of India (Commencement and Transitory Provisions) Order (1936, No. 672, S. R. and O. (1114), s. 3. A federal court was established by the Government of India (Federal Court) Orders (1936, No. 1323, S. R. and O., 1368, and 1937, No. 703, S. R. and O., 1304). The organization and jurisdiction of this federal court are regulated by the Government of India Act in Part IX, c. I, §200*ff*.

layan Union[5] will not be considered; the discussion will be confined to the two federal unions within the British Commonwealth of Nations (Australia and Canada),[6] the four foreign federal governments in the Western Hemisphere (Argentina, Brazil, Mexico, and Venezuela), and two other federations, Switzerland and the U. S. S. R.

The true position and function of the federal courts in these countries cannot be understood from a mere summary of the statutory provisions relating to their organization and jurisdiction. In addition, each case requires a brief general discussion of the constitutional framework within which the courts operate, with emphasis on the scope of the legislative powers of the federal government, and also a special consideration of the constitutional provisions concerning the judicial power under which they are established. Not only the political temperaments of the various nations but also the technical variations of the various federal systems produce such differences that separate treatment with greatest care is indicated to avoid the unwarranted generalizations and semi-truths so often found in comparative studies.

I

FEDERATIONS WITHIN THE BRITISH COMMONWEALTH OF NATIONS

A. The Commonwealth of Australia

1. *General features of the constitutional system*

The Commonwealth of Australia was established as a federation by the Commonwealth of Australia Constitution Act of July 9, 1900.[7] The Commonwealth is composed of six states.[8] In addition it includes six territories, jurisdiction over which has been acquired since the adoption of the Constitution.[9] The distribution of gov-

[5] The Malayan Union was established by Order in Council (1946, S. R. and O., No. 463), made under the Foreign Jurisdiction Act, 1890. The order brings the nine Malayan States into a union under British protection and provides for their administration and for a court system. Four of these states had, until the Japanese occupation, constituted the Federated Malay States, established in 1895, and possessed a federal court system of general jurisdiction. 1 LAWS OF THE MALAY STATES, c. 2 (rev. ed. 1935). A new federal constitution was proposed by England in 1946, but has not yet been put in force.

[6] The Union of South Africa, established by the South Africa Act of 1909, 9 EDW. VII, c. 9, is a unitarian government with some federal features. See W. P. M. KENNEDY AND H. J. SCHLOSBERG, THE LAW AND CUSTOM OF THE SOUTH AFRICAN CONSTITUTION (1935), and Kovalsky, *Federal Elements in the Union Constitution*, 49 So. AFR. L. J. 479 (1932). The South Africa Act created one supreme court which was formed as a combination of the separate colonial courts for the whole union. See KENNEDY AND SCHLOSBERG, *supra*, at 358.

[7] 63 & 64 VICT., c. 12 (1900), 1 COMMONWEALTH ACTS 1901-1935, 1. The leading treatises and commentaries on the Australian Constitution are JOHN QUICK AND R. R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH (1901); WILLIAM HARRISON MOORE, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA (2d ed. 1910); DONALD KERR, THE LAW OF THE AUSTRALIAN CONSTITUTION (1925). Illuminating as to the judicial attitude concerning the interpretation of the constitution is Evatt, *Constitutional Interpretation in Australia*, 3 U. OF TORONTO L. J. 1 (1939), and Dixon, *The Law and the Constitution*, 51 L. Q. REV. 590 (1935). For the history of the adoption of the federal system, see ALFRED DEAKIN, THE FEDERAL STORY (1944).

[8] Commonwealth of Australia Constitution Act, covering clause 6. The states are New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia.

[9] The territories are technically not "parts" of the Commonwealth. They are Federal Capital Territory (seat of the government), Ashmore and Cartier Islands, Papua (New Guinea), Norfolk Island,

ernmental powers is patterned largely after that of the United States. The legislative powers of the Commonwealth Parliament are specifically enumerated in Section 51 of the constitution.[10] They include, among numerous others, powers over interstate commerce, bankruptcy, insurance, and the settlement of industrial disputes. With respect to the federal territories the Commonwealth possesses full legislative powers.[11]

In regard to the position of Australia as member of the British Commonwealth of Nations it may be mentioned that the Statute of Westminster of 1931[12] was adopted pursuant to its terms by the Statute of Westminster Adoption Act of 1942[13] in order to remove "certain legal difficulties."

2. *Constitutional provisions as to the judicial power*

The judicial power of the Commonwealth is regulated by Chapter III of the Commonwealth of Australia Constitution Act.[14] While the influence of the corresponding article of the United States Constitution is obvious, the framers of the Australian instrument nevertheless adopted a scheme which in many respects is quite original and not free from difficulties. There are two essential differences from the United States system: the state courts are "invested" with some of the federal jurisdiction for the purpose of saving the expense of judicial personnel, and the High Court has appellate jurisdiction over non-federal matters decided by the state courts.

The basic provision is contained in Section 71:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.

Subsequent sections specify the scope of the federal jurisdiction and the powers of

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Northern Territory, and the Australian Antarctic Territory. For the statutes regulating their administration, see 3 COMMONWEALTH ACTS 1901-1935, 2767*ff*. The territory of Papua and the mandated territory of New Guinea were temporarily combined as a war measure by the Papua-New Guinea Provisional Administration Act, 1945, Act No. 20. Under Arts. 4 and 5 of the Trusteeship Agreement for the Territory of New Guinea, approved Dec. 13, 1946, Australia is authorized by the United Nations to administer the territory "as if it were an integral part of Australia" and to bring it into union with her other territories. *The United States and Non-Self-Governing Territories*, 18 UNITED STATES-UNITED NATIONS INFORMATION SERIES 96 (1947).

[10] For the legislative powers of the Commonwealth, see, in addition to the works cited *supra*, note 7, JOHN QUICK, THE LEGISLATIVE POWERS OF THE COMMONWEALTH (1919); WILLIAM A. WYNES, LEGISLATIVE AND EXECUTIVE POWERS IN AUSTRALIA (1936).

[11] Commonwealth of Australia Constitution Act, §122.

[12] 22 GEO. V, c. 4.

[13] 40 COMMONWEALTH ACTS 181, No. 56 (1942). For the significance of this statute, see Comment, *The Adoption of the Statute of Westminster*, 16 AUST. L. J. 157 (1942); Harrison, *The Statute of Westminster and Dominion Sovereignty*, 17 AUST. L. J. 282, 314 (1944). See also the discussions of the Statue of Westminster by the Australian Legal Convention 1936, 10 AUST. L. J. SUPP. 96*ff*. (1936).

[14] In addition to the works mentioned *supra*, note 7, the judicial power and system of the Commonwealth are discussed in JOHN QUICK AND LITTLETON E. GROOM, THE JUDICIAL POWER OF THE COMMONWEALTH (1904); Wynes, *The Judicial Power of the Commonwealth*, 11 AUST. L. J. 250, 546 (1937-1938), 12 *id.* at 8 (1938); HORACE E. READ, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW UNITS OF THE BRITISH COMMONWEALTH (2 HARVARD STUDIES IN THE CONFLICT OF LAWS) 27 *ff*. (1938); Bailey, *The Federal Jurisdiction of the State Courts*, 2 RES JUDICATAE 109, 184 (1940). Also illuminating in this connection are the papers by Justice Dixon, *Address to the Section of the American Bar Association for International and Comparative Law*, 17 AUST. L. J. 138 (1943), and *The Law and the Constitution*, 51 L. Q. REV. 590 (1935).

Parliament in relation thereto. The constitution distinguishes between original and appellate jurisdiction.

a. Original jurisdiction is given to the High Court directly by the constitution in five categories of cases, viz., in all matters[15] (1) arising under any treaty, (2) affecting consuls or other representatives of other countries, (3) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party, (4) between states, or between residents of different states, or between a state and a resident of another state, and (5) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.[16] In addition the constitution authorizes Parliament to confer original jurisdiction upon the High Court in four other categories of cases, viz., in all matters (1) arising under the Constitution or involving its interpretation, (2) arising under any laws made by the Parliament, (3) of admiralty and maritime jurisdiction, and (4) relating to the same subject matter claimed under the laws of different states.[17]

Parliament is also authorized, however, to give federal jurisdiction in these nine types of cases to federal courts other than the High Court or to invest any state court with it and to declare to what extent the jurisdiction given to federal courts shall be exclusive.[18]

b. The appellate jurisdiction of the High Court as defined in Section 73 is broader in scope than the original federal jurisdiction.[19] Subject to regulation by Parliament, it extends to three classes of federal matters, viz., judgments and orders (1) of any justice or justices exercising the original jurisdictions of the High Court,[20] (2) of any other court exercising federal jurisdiction, be it state or federal, and (3) as to points of law only, of the Interstate Commission.[21] In addition, however, appeal will also lie from the Supreme Court of any state or from any other court from which an appeal lay to the Privy Council at the establishment of the Commonwealth.[22] Apart from Section 73, the legislature also has the power to confer jurisdiction of appeals from the territorial courts upon the High Court under Section 122.[23]

[15] The High Court has taken the position that "there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court." *In re* Judiciary and Navigation Acts, 29 C. L. R. 257, 265 (1921); but recently it seems to have broadened its concept somewhat in R. v. The Commonwealth Court of Conciliation and Arbitration, 19 AUST. L. J. 169 (1945), holding it a proper judicial function to direct observance of the by-laws of registered employers' or employees' organizations.

[16] Commonwealth of Australia Constitution Act, §75.

[17] *Id.*, §76.

[18] *Id.*, §77.

[19] See MOORE, *op. cit. supra*, note 7, at 220*ff*.

[20] It is thus recognized by implication that the original jurisdiction of the High Court may be exercised by a single justice.

[21] The Interstate Commission operates under the Interstate Commission Act of 1912, 2 COMMONWEALTH ACTS 1901-1935, 1352, passed pursuant to Commonwealth of Australia Constitution Act, §101.

[22] In so far as an appeal lay from a state supreme court to the Privy Council at the establishment of the Commonwealth, Parliament cannot divest the High Court of its appellate jurisdiction. §73. The scope of this limitation upon the regulatory power of Parliament is not free from doubt. See WILLIAM HARRISON MOORE, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA 224 (2d ed. 1910).

[23] Porter v. The King; *Ex parte* Yee, 37 C. L. R. 432 (1926). The same power has been held to exist with respect to the mandated territory of New Guinea, but disagreement exists whether it flows from §122 or the foreign relations power, §51 (xxix). Ffrost v. Stevenson, 58 C. L. R. 528 (1937).

The High Court is thus not only the highest federal court of the Commonwealth but also the highest "national court of appeal of general and unlimited jurisdiction."[24] No appeal of right lies from the High Court to the Judicial Committee of the Privy Council. However, the Crown may grant leave to appeal in the exercise of its prerogative, except from a decision upon a question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any state or of any two or more states, in which case a special certificate from the High Court is a prerequisite.[25]

The concept of "federal jurisdiction" according to Australian constitutional law is thus defined by its subjects or, even more accurately, by its source,[26] without regard to whether it is exercised by the federal or the state judiciary. In so far as it is administered in state courts it is termed "invested" federal jurisdiction.[27]

3. *Statutory provisions as to the organization of federal courts*

Pursuant to the authorization contained in Sections 71 and 122 of the constitution, Parliament has regulated the organization of the federal courts in the Judiciary Act 1903-1946 and a few special statutes.

[24] JOHN QUICK AND R. R. GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH 742 (1901); JOHN QUICK AND LITTLETON E. GROOM, THE JUDICIAL POWER OF THE COMMONWEALTH 33 (1904).

[25] Commonwealth of Australia Constitution Act, §74. The exact scope of the "*inter se* constitutional questions" (as they are called) is a troublesome and complex problem. The granting of the certificate under §74 is in the discretion of the High Court. As to the considerations which control the exercise of the discretion, *see* Australian National Airways Pty, Ltd. v. Commonwealth (No. 2), 20 AUST. L. J. 76 (1946). As to the sequence of obtaining leave from the Privy Council and the certificate from the High Court, see *ibid.* For a case in which the construction of the constitutional powers came before the Privy Council, *see* James v. Commonwealth of Australia *et al.*, [1936] A. C. 578, 55 C. L. R. 1.

[26] "The phrase 'Federal Jurisdiction' as used in §§71, 73 and 77 of the constitution means jurisdiction derived from the Federal Commonwealth. It does not denote a power to adjudicate in certain matters, though it may connote such a power; . . ." Lorenzo v. Carey, 29 C. L. R. 243, 252 (1921). Similarly, Baxter v. Commissioners of Taxation, 4 C. L. R. 1087, 1142 (N. S. W. 1907) ("federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and Laws"). See also Bailey, *The Federal Jurisdiction of State Courts, supra,* note 14.

[27] *Cf.* Commonwealth of Australia Act, §77 (iii). The exact scope of the "invested" federal jurisdiction has been particularly troublesome in connection with the question of the validity of §39(2)(a) of the Judiciary Act 1903-1946, which abrogates all appeals to the Privy Council from state supreme courts in matters within their federal jurisdiction, except those by the Crown's prerogative. The Privy Council, in the much criticized case of Webb v. Outrim, [1907] A. C. 81, refused to be bound by this provision. It apparently followed the Supreme Court of Victoria, which granted leave to appeal and considered as within the federal jurisdiction of the state courts only such matters as they could not have passed upon except for a Commonwealth act. This view is, of course, much narrower than that of the High Court in cases cited in note 26, *supra.* The High Court developed various theories for the application of §39(2)(a) despite Webb v. Outrim. See Bailey, *supra,* note 14. It may be noted that the additional reason suggested for the invalidity of §39(2)(a), *i.e.,* the Colonial Laws Validity Act of 1865, no longer presents a serious difficulty. The Statute of Westminster, §2(1), repealed this act with respect to all laws passed after its adoption, and the Colonial Laws Validity Act constituted merely an additional (imperial) limitation on the powers of Parliament without limiting the scope of constitutional provisions such as §77(iii); *cf.* A. G. for Ontario v. A. G. for Canada [1947] A. C. 127. While Lorenzo v. Carey intimated that a state court could exercise either federal or state jurisdiction in the same subject matter, it is apparently the view now that federal jurisdiction supersedes state jurisdiction. Dixon J., in Ffrost v. Stevenson, *supra* note 23, and Jordan, C. J., in *Ex parte* Coorey, 45 S. R. 287, 301 (N. S. W. 1944).

The High Court, since 1933, consists of the Chief Justice and five other justices.[28] The court holds its hearings at its principal seat (which at present is Melbourne but ultimately will be Canberra), the other state capitals, or any other place where the Governor General has established a district registry.[29] The members of the court sit either as single justices or as a full court. Original jurisdiction may be exercised by a single justice, while appeals must be heard by the full court.[30] The latter requires normally the presence of at least two, and in specified cases of particular importance, of three justices.[31] Decisions involving the constitutional powers of the Commonwealth by a court consisting of less than all justices may be rendered only if at least three justices concur.[32] In addition to the High Court, the Commonwealth Court of Conciliation and Arbitration[33] and a Federal Court of Bankruptcy[34] form a part of the federal judiciary. For the administration of justice in the territories the Supreme Court of the Australian Capital Territory,[35] the Supreme Court of the Northern Territory,[36] the Supreme Court of Papua-New Guinea,[37] and the Court of Norfolk Island[38] have been established. These do not, however, exercise federal jurisdiction in the constitutional sense.[39]

4. *Statutory provisions regulating federal jurisdiction*

The powers conferred upon Parliament by Sections 73, 76, and 77 of the constitution have been exercised in the Judiciary Act 1903-1946, Part VI, the Commonwealth Conciliation and Arbitration Act 1901-1946, and the Bankruptcy Act 1924-1933.

a. In addition to the original jurisdiction of the High Court directly granted by Section 75,[40] the Judiciary Act confers original jurisdiction pursuant to Section 76 in

[28] Judiciary Act 1903-1946, 2 COMMONWEALTH ACTS 1901-1935, 1379, §4.
[29] *Id.* §§10, 11, 12.
[30] *Id.* §§15 and 20.
[31] *Id.* §§19, 21, 22.
[32] *Id.* §23.
[33] Commonwealth Conciliation and Arbitration Act, 1904-1946, §11*ff*, 1 COMMONWEALTH ACTS 1901-1935, 115. Until an amendment of 1926 this court was not a federal court in the technical sense. The Waterside Workers' Fed. v. Alexander, 25 C. L. R. 434 (1918). Since that date it has been a constitutional court exercising federal jurisdiction (Jacka v. Lewis, 68 C. L. R. 455 (1944); R. v. The Commonwealth Court of Conciliation and Arbitration, *supra* note 15), although not all of its functions are therefore judicial. Consolidated Press Ltd. and Prenton v. Australian Journalists' Ass'n, 21 AUST. L. J. 61 (1947). *Cf.* Ross, *The Constitutional History of Industrial Arbitration in Australia*, 30 MINN. L. R. 1, 6 (1945).
[34] Bankruptcy Act, 1924-1933, §18A, 1 COMMONWEALTH ACTS 1901-1935, 232, 241.
[35] Seat of Government Supreme Court Act, 1933-1945, 3 COMMONWEALTH ACTS 1901-1935, 2307. Acts 1905, No. 57.
[36] Northern Territory (Administration) Act 1910-1940 §18, 3 COMMONWEALTH ACTS 1901-1935, 2799, 2803.
[37] Papua Act 1905-1940, §43, 3 COMMONWEALTH ACTS 1901-1935, 2804, 2815, as amended by 38 COMMONWEALTH ACTS 82 (1940) No. 47, §15. After the recapture of the area a Supreme Court was reestablished by the Papua-New Guinea Provisional Administration Act 1945, No. 20. The government now operates under the Trusteeship Agreement, cited *supra* note 9.
[38] Ordinance to Establish a Court for the Territory of Norfolk Island and for Other Purposes, 1936, No. 15, Commonwealth of Australia Gazette, August 13, 1936.
[39] R. v. Bernasconi, 19 C. L. R. 629 (1915); Porter v. King; *Ex parte* Yee, 37 C. L. R. 432 (1926); *cf.* note 23, *supra*.
[40] See note 16, *supra*, and text.

two classes of cases, viz., (1) all matters arising under the Constitution and involving its interpretation, and (2) offenses against federal statutes.[41]

With the exception of a list of specifically enumerated cases, the original jurisdiction of the High Court is concurrent with that of the state courts. Using the authority granted under Section 77(iii) of the constitution, Parliament has provided:

> The several Courts of the States shall within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter, or otherwise, be invested with federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it, except as provided in the last two preceding sections.[42]

These exceptions in which the High Court has been given exclusive original jurisdiction pursuant to Section 77(ii) are matters arising under any treaty, suits between states or persons suing or being sued on behalf of a state, suits between the Commonwealth and a state or persons suing or being sued on behalf of either, and writs against Commonwealth officials.[43] In addition it is provided that in the *inter se* constitutional questions[44] the High Court shall have jurisdiction exclusive of the state supreme courts[45] and that any cause involving such a question shall be removed *ex officio* by the Supreme Court to the High Court.[46] Any other cause involving a constitutional question may be removed from any state court to the High Court upon the application of either party upon sufficient cause.[47]

The concurrent federal jurisdiction of the state courts is exercised by them without any change of their constitution and organization, over which the federal government lacks power.[48] While Section 39(2) of the Judiciary Act, quoted above, also leaves the territorial limits of their jurisdiction unaltered, the Bankruptcy Act has invested the specified state courts with federal jurisdiction in bankruptcy throughout the Commonwealth.[49]

The High Court and the state supreme courts also exercise concurrent original jurisdiction in admiralty. This jurisdiction is not based on the Judiciary Act[50] but on the British Colonial Courts of Admiralty Act, 1890.[51] As to this the jurisdiction of the High Court is not "federal" in the technical sense.[52]

[41] Judiciary Act, 1903-1946, *supra*, note 28, §30, as amended in 1939, 37 COMMONWEALTH ACTS 128, No. 43.

[42] *Id.* §39(2). [43] *Id.* §38. [44] See note 25, *supra*, and text.

[45] *Id.* §38A. [46] *Id.* §40A. [47] *Id.* §40.

[48] Le Mesurier v. Connor, 42 C. L. R. 481 (1929); Adams v. Chas. S. Watson Pty Ltd., 60 C. L. R. 545, 555 (1938); Peacock v. Newtown Marrickville and General Co-operative Bldg. Soc. No. 4 Ltd., 67 C. L. R. 25, 37 (1943); *Ex parte* Coorey, *supra*, note 27.

[49] Bankruptcy Act 1924-1933, *supra*, note 34, §18(1)(b). The validity of this section seems to be reconcilable with the rule announced in the cases cited in note 48, *supra*.

[50] Provisions in the Judiciary Act pertaining to admiralty were repealed in 1939 (37 COMMONWEALTH ACTS 128, No. 43) to alleviate previous doubts concerning the concurrent admiralty jurisdiction of state courts. *See* Union Steamship Co. of N. Z., Ltd. v. The Cardale, 56 C. L. R. 277 (1937).

[51] 53 & 54 VICT., c. 27 (1890). *See* McIlwraith McEacharn Ltd. v. The Shell Company of Australia Ltd., 19 AUST. L. J. 82 (1945).

[52] Lathan, C. J., in Musgrave v. The Commonwealth, 57 C. L. R. 514, 532 (1937): "In Australia jurisdiction may be exercised in Admiralty and perhaps under the British Bankruptcy Act, which is neither Federal nor State jurisdiction. . . ." *See also* Nagrint v. The "Regis," 61 C. L. R. 688 (1939).

b. The appellate jurisdiction of the High Court, apart from special statutes, extends (1) to all judgments rendered by single justices of the High Court, and (2) to all judgments of state supreme courts or other state courts which at the time of the adoption of the constitution were appealable to the Privy Council, regardless of whether they are rendered in the exercise of federal, state, or colonial jurisdiction, provided that the value involved amounts to £300.[53] Appeal to the Privy Council from the judgment of a state supreme court rendered in the exercise of its federal jurisdiction lies only as a matter of the Crown's prerogative.[54] In appeals from state courts in non-federal matters the powers of the High Court are circumscribed by state law.[55]

5. *Statutory provisions as to the applicable law*

The Judiciary Act contains a section which was modeled after the celebrated Section 34 of the United States Judiciary Act of 1789. Section 79 of the Australian statute provides:

> The laws of each State, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all courts exercising federal jurisdiction in that State in all cases to which they are applicable.

While the construction of this section has not produced a rule similar to that of *Swift v. Tyson*,[56] and the whole of the state law has controlled the exercise of the "invested" federal jurisdiction, the applicability of the section to the High Court has produced doubts. In the latest case involving the point, which was tried in New South Wales and which concerned the liability of the Commonwealth for a libel published in Queensland,[57] Chief Justice Latham, sitting as single justice, thought that he was bound by the conflicts rule of New South Wales.[58] On appeal two justices disagreed with the Chief Justice, declaring that the law of Queensland applied directly.[59] One justice refused to commit himself on the question since the law of Queensland would control even under the conflicts rule of New South Wales.[60] The remaining justice agreed with the Chief Justice but suggested as an

[53] Judiciary Act, *supra*, note 28, §§34 and 35. Section 35 applies to appeals in admiralty. McIlwraith McEacharn Ltd. v. The Shell Company of Australia Ltd., *supra* note 51.

[54] Judiciary Act 1903-1946, §39(2)(a). As to the validity of this section, see note 27, *supra*.

[55] McDonnell & East Ltd. v. McGregor, 56 C. L. R. 50 (1936).

[56] 16 Pet. 1 (U. S. 1842).

[57] Musgrave v. The Commonwealth, *supra*, note 52.

[58] "A state court may exercise either its State jurisdiction under State statutes or Federal jurisdiction under §77(iii) of the Constitution. In my opinion Federal courts exercise Federal jurisdiction only, and I think all their jurisdiction must be regarded as federal jurisdiction. I therefore regard §79 of the Judiciary Act as applying. Thus I apply the law of New South Wales." *Id.* at 532. The learned justice consequently refused to follow Lady Carrington Steamship Co. Ltd. v. The Commonwealth, 29 C. L. R. 596 (1921), and Cohen v. Cohen, 42 C. L. R. 91 (1929), which had taken the opposite view.

[59] "Whatever may be the precise limits to be assigned to §79 of the Judiciary Act, it does not introduce, for the purpose of determining the lawfulness of the publication complained of, the general body of New South Wales law, merely because the action, being instituted in the High Court, happens to have been heard at Sydney." Per Evatt and McTiernan, JJ., *id.* at 551.

[60] Justice Rich, *id.* at 543.

alternative ground that the liability of the Commonwealth was a matter of federal substantive law, which itself predicated the liability on the *lex loci delicti*.[61] In view of this disagreement the question remains open.

6. Diversity jurisdiction in particular

The foregoing discussion shows that in ordinary diversity of citizenship cases the state courts and the High Court have concurrent jurisdiction. Removal can be requested only if constitutional questions are involved.[62] In as much as there are only six states, the existence of the diversity jurisdiction has not created a heavy burden. The word "resident" used in Section 75 of the constitution has been held not to include a corporation.[63] A temporary abode has likewise been declared insufficient to make a person a resident.[64]

B. The Dominion of Canada

1. General features of the constitutional system

The Dominion of Canada was established as a federal union by the British North America Act of 1867.[65] It is composed of nine provinces[66] and two territories.[67] The distribution of legislative powers between the Dominion and the provinces is regulated by Part VI of the British North America Act, the ultimate judicial construction of which has rested until today with the Privy Council.[68]

In contrast to the federal scheme of the United States, the Canadian constitution does not proceed on a theory of "delegated" and "reserved" powers. It defines the legislative powers of both the Dominion Parliament and the provincial legislatures.[69]

[61] Justice Dixon, *id.* at 546.

[62] See note 47, *supra*, and text.

[63] The Australasian Temperance and General Mutual Life Assurance Society Ltd. v. Howe, 31 C. L. R. 290 (1922); Cox v. Journeaux, 52 C. L. R. 282 (1934).

[64] Coates v. Coates, VICT. L. R. 231 (1925).

[65] 30 & 31 VICT., c. 3. For the Canadian constitutional law in general see the (partly antiquated) treatises by A. H. F. LEFROY, CANADA'S FEDERAL SYSTEM (1913), A. H. F. LEFROY AND W. P. M. KENNEDY, A SHORT TREATISE ON CANADIAN CONSTITUTIONAL LAW (1918), and W. H. P. CLEMENT, THE LAW OF THE CANADIAN CONSTITUTION (3d ed. 1916). Also important are the *Hearings of the Special Committee on the B. N. A. Act* (1935).

[66] Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan.

[67] Yukon Territory and Northwest Territory.

[68] The Canadian constitution contains no clause like that of the Australian instrument which withholds constitutional *inter se* questions from the Privy Council except in the exercise of the royal prerogative. Constitutional questions may reach the Privy Council on appeals not only from judgments in contested controversies, but also from advisory opinions of Canadian courts on projected legislation, a practice declared legal in A. G. for Ontario v. A. G. for Canada [1912] A. C. 571.

[69] See Kennedy, *Nature of Canadian Federalism*, in ESSAYS IN CONSTITUTIONAL LAW 27*ff.* (1934). Both the federal and the provincial powers are derived from the imperial act and are therefore "devolved" powers. HORACE E. READ, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN THE COMMON LAW UNITS OF THE BRITISH COMMONWEALTH (2 HARVARD STUDIES IN THE CONFLICT OF LAWS) 14 n. 48 (1938). The whole range of legislative powers within the new Dominion is exhausted by this distribution. Canadian constitutional theorists, on the basis of the history of the constitution, claim that the "ultimate residuum" of legislative power was intended to be assigned to the Dominion. Kennedy, *The Interpretation of the B. N. A.*, 8 CAMB. L. J. 146, 148 (1943); Tuck, *Canada and the Judicial Committee of the Privy Council*, 4 U. OF TORONTO L. J. 33, 42 (1941); and (semble) LEFROY, *op. cit. supra*, note 65, at 91*ff.*; but see CLEMENT, *op. cit. supra*, note 64, at 452.

Section 91 enumerates by subjects the legislative powers of the Dominion (among them the regulation of trade and commerce and bankruptcy), but contains in addition a general introductory clause which grants the power "to make laws for peace, order, and good government in Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces." Section 92 lists the matters which are thus exclusively assigned to provincial legislation. They likewise include two broad and vaguely defined fields, viz., "property and civil rights in the province" and "generally all matters of a merely local and private nature in the province." In construing these clauses the Privy Council has endeavored to protect the autonomy of the provinces. It has tried to accomplish this by the technique of giving a broad scope to the terms "property and civil rights," by restricting the authority granted by the "general head" of Section 91 to a mere emergency power, and by whittling away the powers under the commerce clause.[70] The case law so developed has been criticized as exhibiting lack of statesmanship and consistency, violating the basic principles of Canadian federalism, and hampering Dominion progress.[71] As a result, a bill for the total[72] abolition of appeals to the Privy Council from Canada has been introduced, but, though the Privy Council has affirmed[73] its validity, it has not been enacted into law as yet.[74]

2. *Constitutional provisions as to the judicial power*

The Canadian constitution, unlike those of Australia and the United States, does not establish a specific federal jurisdiction. Subject to the restriction that the appointment of the judges is a function of the Governor General,[75] the administration of justice in the provinces is a matter for their legislative regulation.[76] However, the constitution empowers the Dominion to establish a "General Court of Appeal for Canada" and any "additional courts for the better administration of the laws of Canada."[77] There is no provision for ordinary diversity jurisdiction.

3. *Statutory provisions as to the organization of federal courts*

Pursuant to the constitutional authorization, a number of federal courts have

[70] Illustrative of these tendencies are A. G. for Toronto v. A. G. for the Dominion, [1896] A. C. 348; *In re* the Board of Commerce Act, 1919, and the Combines and Fair Price Act, 1919, [1922] A. C. 191; Toronto Electric Commissioners v. Snider, [1925] A. C. 396; A. G. for Canada v. A. G. for Ontario, [1937] A. C. 326, 353; A. G. for British Columbia v. A. G. for Canada, [1937] A. C. 377; Cooperative Committee on Japanese Canadians v. A. G. for Canada, [1947] A. C. 87.

[71] *Cf.* Smith, *The Residue of Power in Canada*, 4 CAN. B. REV. 432 (1926); MacDonald, *Judicial Interpretation of the Canadian Constitution*, 1 U. OF TORONTO L. J. 260 (1936); Jennings, *Constitutional Interpretation—The Experience of Canada*, 51 HARV. L. R. 1 (1937); Tuck, *Canada and the Judicial Committee of the Privy Council*, 4 U. OF TORONTO L. J. 33 (1941); Kennedy, *The Interpretation of the British North America Act*, 8 CAMB. L. J. 146 (1943).

[72] Criminal appeals have been abolished since 1934, 23 & 24 GEO. V, c. 53, upheld by British Coal Coop. v. The King [1935] A. C. 500.

[73] A. G. for Ontario v. A. G. for Canada, [1947] A. C. 127.

[74] See the Symposium on the Abolition of Appeals to the Privy Council, 25 CAN. B. REV. 557 (1947).

[75] British North America Act, 1867, §96.

[76] *Id.* §92(14).

[77] *Id.* §101.

been established. The most important is the Supreme Court of Canada.[78] It consists of the Chief Justice and six puisne judges, and has its seat at Ottawa. In addition there has been created an Exchequer Court of Canada, which is composed of a President, three puisne judges,[79] and an undefined number of "District Judges in Admiralty of the Exchequer" for any of the six existing Admiralty districts.[80] There are no separate federal bankruptcy courts, but by the Bankruptcy Act certain provincial or territorial courts have been constituted courts of bankruptcy and invested with jurisdiction in bankruptcy effective in the whole Dominion.[81]

In the Yukon Territory a special territorial court has been established, the judge of which may be relieved by stipendiary magistrates,[82] while in the Northwest Territories justice is administered by stipendiary magistrates or the superior courts and probate courts of the neighboring provinces.[83]

4. *Statutory provisions regulating federal jurisdiction*

Since the bankruptcy courts are state tribunals invested with federal jurisdiction embracing the customary bankruptcy matters, and the territorial courts exercise merely general local jurisdiction, the functions of the two major courts are the only ones of interest.

a. *The Exchequer Court.* This tribunal is the sole court in the Dominion exercising federal jurisdiction which depends either on the character of the parties or the subject matter. Thus controversies involving the Crown or its officers are within its competence. It has exclusive original jurisdiction in all suits of a civil nature *against* the Crown, based either on the common law or equity as administered in England, and other specifically enumerated causes.[84] It has concurrent original jurisdiction in civil actions at law or equity *by* the Crown, in proceedings to enforce Dominion revenue statutes, and in actions against officers of the Crown for acts or omissions in the performance of their official duties.[85]

In addition Parliament has validly[86] conferred upon the Court jurisdiction over certain subject matters which are within the legislative competence of the Dominion. Thus the Exchequer Court has jurisdiction over claims involving the grant, validity,

[78] REV. STATS. OF CANADA, 1927, c. 35, as amended by the 1928 STATS., c. 9; 1929 STATS., c. 58; 1930 STATS., c. 44; 1937 STATS., c. 42.

[79] REV. STATS., OF CANADA, 1927, c. 34, as amended by 1928 STATS., c. 23; 1930 STATS., c. 17; 1932-33 STATS., c. 13; 1938 STATS., c. 28; 1943-44 STATS., c. 25; 1944-45 STATS., c. 3; 1946 STATS., c. 22.

[80] Admiralty Act, 1934, 1934 STATS., §§3, 4.

[81] REV. STATS. OF CANADA, 1927, c. 11, §152*ff*., §170., 1932-33 STATS., c. 36, §2; *cf*. READ, *op. cit. supra*, note 69, at 22.

[82] REV. STATS. OF CANADA, 1927, c. 215, §50*ff*., as amended by 1929 STATS., c. 62, 1940-41 STATS., c. 30.

[83] REV. STATS. OF CANADA, 1927, c. 142 §34*ff*., as amended by 1938 STATS., c. 38, 1940 STATS., c. 36.

[84] REV. STATS. OF CANADA, 1927, c. 34, §§18-20, as amended by 1932-33 STATS., c. 13, 1938 STATS., c. 28.

[85] *Id*. §30.

[86] Statutes conferring jurisdiction ignoring the limitation indicated in the text have been declared invalid. See READ, *op. cit. supra*, note 69, at 17.

or infringement of patents, copyrights, trade-marks, or inventions, even between private parties,[87] and over the enforcement of liens and mortgages on the property of railroads engaged in interprovincial commerce.[88] The Exchequer Court, through its "Admiralty Side," adjudicates also all matters of maritime jurisdiction and prize law.[89]

b. *The Supreme Court of Canada.* The statute distinguishes between appellate and special jurisdiction. The latter covers advisory opinions upon reference either by the Governor in Council or the Senate or the House of Commons.[90] Civil appeals lie as a matter of right from the final judgments of the highest court in a province, provided that the value of the matter in controversy exceeds $2,000,[91] or from a final judgment of the Court of Exchequer, if the amount in controversy exceeds $500.[92] In other non-criminal cases which belong to certain rather narrowly defined categories, appeal may be perfected by leave obtained either from the court of last resort rendering the decision or from the Supreme Court itself.[93] Appeals in criminal matters are regulated by the criminal code.[94] Appeal may even lie from an advisory opinion rendered by a provincial court.[95] The Supreme Court consequently acts as a national or federal court of appeal according to whether the case comes up from a provincial court or the Exchequer Court.[96]

II

THE SOUTH AND CENTRAL AMERICAN FEDERATIONS

A. The Argentine Nation

1. *General features of the constitutional system*

Of all the South and Central American republics, the federal system of Argentina presents the greatest similarity to that of the United States. It was established in 1853 as the culmination of a series of constitutional experiments.[97] The constitution

[87] REV. STATS. OF CANADA, 1927, c. 34, §22, as amended by 1928 STATS., c. 28, §3.

[88] *Id.* §27.

[89] Admiralty Act, 1934 STATS., c. 31, as amended by 1935 STATS., c. 35; Canada Prize Act, 1945 STATS., c. 12.

[90] Supreme Court Act, REV. STATS. OF CANADA, 1927, c. 35, §§55, 56.

[91] *Id.* §§36 and 39.

[92] Exchequer Court Act, REV. STATS. OF CANADA, 1927, c. 34, §82.

[93] Supreme Court Act, REV. STATS. OF CANADA, 1927, §§37, 41, as amended by 1937 STATS., c. 42. See the criticism by HOW, *The Too Limited Jurisdiction of the Supreme Court of Canada,* 25 CAN. B. REV. 573 (1947).

[94] Criminal Code, REV. STATS. OF CANADA, 1927, c. 36, §§1023 and 1025. See the criticism by HOW, *supra,* note 93, at 580*ff.*

[95] Supreme Court Act, REV. STATS. OF CANADA, 1927, c. 35, §43.

[96] See READ, *op. cit. supra,* note 69, at 24-26. The Court may hear appeals from the court of British Columbia which have been decided on appeal from the Yukon Territory. Yukon Act, REV. STATS. OF CANADA, 1927, c. 215, §78(9).

[97] For the history of the Argentine Constitutions from the Estatuto Provisional of Nov. 22, 1811, to the present charter, see AMADEO, ARGENTINE CONSTITUTIONAL LAW (4 COLUMBIA LEGAL STUDIES) 3*ff.* (1943); ANTOKOLETZ, MANUAL TEORICO Y PRACTICO DE DERECHO PUBLICO CONSTITUCIONAL Y ADMINISTRATIVO 148*ff.* (1939); AMUCHASTEGUI, LA CONSTITUCION NACIONAL ARGENTINA, "SU GENESIS-SU ALMA" (1939);

of that year is technically still in force. It was, however, extensively revised in 1860 when the Province of Buenos Aires joined the Argentine Confederation. Further amendments were made in 1866 and 1898. The Argentine nation under the present charter is composed of fourteen sovereign provinces,[98] the federal district of the capital,[99] and the federal territories.[100]

The constitution defines in its first part the nature of the federation and the bill of rights, and in its second part the powers of the national government (Title I) and of the provinces (Title II).[101] The provinces possess all powers not delegated to the national government.[102] They must, however, under the sanction of intervention, adopt a constitution of a representative republican type which assures the administration of justice.[103] The powers of the central government are divided into the usual three branches. The legislative powers are specifically enumerated in Article 67. Its most important subdivision for our purpose is Number 11, which grants to the national government the power to

> . . . enact the civil, commercial, penal and mining codes,[104] provided however, that these codes shall not modify the jurisdiction of the local courts which shall be exercised by either the federal or the provincial tribunals, according to whether the persons or subject matter fall within their respective jurisdiction; and especially general laws for the whole nation on naturalization and citizenship, subject to the principle of natural citizenship; and also on bankruptcy. . . .

Congress possesses full legislative powers with respect to the federal district and the territories.[105]

2. *Constitutional provisions as to the judicial power*

The judicial power of the national government is regulated by Part II, Title 1, Section 3, which was modeled after the corresponding provisions in the Constitution

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1 GONZALES CALDERON, DERECHO CONSTITUCIONAL ARGENTINO 1*ff*. (1923); SECO VILLALBRA, FUENTES DE LA CONSTITUCION ARGENTINA (1943); VARELA, HISTORIA CONSTITUCIONAL DE LA REPUBLICA ARGENTINA (4 vols. 1910).

[98] They are Buenos Aires, Catamarca, Córdoba, Corrientes, Entre Ríos, Jujuy, La Rioja, Mendoza, Salta, San Juan, San Luis, Santa Fe, Santiago del Estero, and Tucumán.

[99] CONST. 1853, Art. 3. The capital is the City of Buenos Aires, which was ceded to the nation by the province of the same name. Statute No. 1029 of 1880, 4 COLECCION COMPLETA DE LEYES NACIONALES 525 (1918).

[100] CONST. 1853, Art. 67(14). The territories at present are La Pampa, Neuquén, Río Negro, Chubut, Santa Cruz, Tierra del Fuego, Misiones, Formosa, and Chaco. Their administration and government are regulated by Statute No. 1532 of 1884, 6 COLECCION COMPLETA DE LEYES NACIONALES 110, and numerous later amendments, particularly Statutes Nos. 2662 of 1889 and 2735 of 1890, 9 *id*. at 164, 254; Statute No. 3575 of 1897, 11(2), *id*. at 377. The former territory of Los Andes was divided and annexed to the three neighboring provinces by Decree No. 9375 of 1943.

[101] The leading texts on Argentine constitutional and federal law are ANTOKOLETZ, *op. cit. supra* note 97; BAS, EL DERECHO FEDERAL ARGENTINO (2 vols. 1927); GONZALES CALDERON, DERECHO CONSTITUCIONAL ARGENTINO (2 vols.) (2d ed. 1923-1936); ZAVALIA, DERECHO FEDERAL (2 vols.) (3d ed. 1941).

[102] CONST. 1853, Art. 104.

[103] *Id*., Arts. 5 and 6.

[104] Argentina has enacted the four codes thus authorized.

[105] CONST. 1853, Art. 67(27) and (14).

of the United States.[106] The judicial power is vested in a Supreme Court of Justice and such inferior tribunals as Congress establishes by statute.[107] The jurisdiction of the federal courts is regulated by Articles 100 and 101, which contain the following provisions:

Art. 100. The Supreme Court and the inferior tribunals of the nation shall have cognizance and adjudication of all suits which involve issues governed by the constitution and by the laws of the nation with the reservation made in Article 67(11), and by treaties with foreign nations; of suits concerning foreign ambassadors, public ministers and consuls; of suits in admiralty and maritime jurisdiction; of suits in which the nation is a party; of suits which arise between two or more provinces, between a province and inhabitants of another; and between a province or its inhabitants against [and?] a foreign state or citizen.

Art. 101. In these cases the Supreme Court shall exercise jurisdiction on appeal according to the rules and exceptions which Congress prescribes; however, in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province is a party, it shall exercise original and exclusive jurisdiction.

Thus, Argentina, like the United States, has adopted a concept of federal jurisdiction defined by the subject matter or the persons over which it is exercised, and has provided for the establishment of a dual judiciary. In contrast to United States law, however, it has been believed that this dualism is also mandatory for the capital territory. Hence, we find there one set of federal judges administering "federal jurisdiction" and another set administering "ordinary jurisdiction."[108]

3. *Statutory provisions as to the organization of the federal courts*

a. The federal judiciary exercising federal jurisdiction in the technical sense consists of three groups of courts:

(1) The Federal Supreme Court of Justice, which is composed of five justices;[109]

(2) Eight Federal Chambers of Appeal, composed of three judges each except in the provinces of Buenos Aires and La Plata, where they have five judges.[110]

[106] There exist many excellent treatments of the organization and jurisdiction of the federal judiciary. The leading text is GONDRA, JURISDICCION FEDERAL (1944). Shorter presentations can be found in 1 ALSINA, TRATADO TEORICO PRACTICO DE DERECHO PROCESAL CIVIL Y COMERCIAL 366*ff.* (3 vols. 1941-1943); 1 BAS, *op. cit. supra* note 101, at 327*ff.*; 1 ZAVALIA, *op. cit. supra* note 101, at 295*ff.*; SAENZ VALIENTE, CURSO DE DERECHO FEDERAL 77*ff.* (1944); AQUINO Y BARILLATTI, LECCIONES DE DERECHO USUAL Y PRACTICA FORENSE 145*ff.* (1944); 2 PEREZ, TRATADO SOBRE LA JURISPRUDENCIA DE LA CORTE SUPREMA 1*ff.* (15 vols. 1941); ALSINA, RESENA DE LA ORGANIZACION JUDICIAL EN LA REPUBLICA ARGENTINA, 5 REVISTA UNIVERSITARIA JURIDICES Y SOCIALES 78*ff.* (1939).

[107] CONST. 1853, Art. 94, in connection with Art. 67(11).

[108] See *infra*, under III.

[109] The organization of the Supreme Court of Justice is based on Statute No. 27 of 1862, 3 LEYES NACIONALES 21*ff.* (Peralta, ed. 1940).

[110] The Federal Chambers of Appeal were created by Statute No. 4055 of 1902, *id.* at 31*ff.* The original number of four was subsequently increased to the present eight. For details, see 1 ALSINA, *op. cit. supra* note 106, at 389.

(3) Twenty-nine Federal Sectional Judgeships, each of which is constituted by one judge.[111] Originally each province formed one section with one judgeship (except Santa Fe, which possessed two), but the number has gradually been increased.[112]

b. The federal judiciary exercising ordinary jurisdiction in the capital consists of two Chambers of Civil Appeals, one Chamber of Commercial Appeals, one Chamber of Criminal Appeals, and one Chamber of Labor Appeals,[113] as well as a number of judgeships of first instance for civil, commercial, criminal, and labor cases, and justices of the peace.[114]

c. In the other territories both federal and ordinary jurisdiction are administered by two Chambers of Appeals for the Courts of Justice,[115] seventeen professional judges, and a number of justices of the peace.[116]

4. *Statutory provisions regulating federal jurisdiction (in the technical sense)*

Pursuant to the constitutional authorization Congress has regulated the details of federal jurisdiction by statute.[117]

a. *The limits of legislative discretion.* The original jurisdiction of the Supreme Court is narrowly defined by the constitution, but the same cannot be said of the appellate jurisdiction of that tribunal or the jurisdiction of the inferior federal courts. While Congress cannot add to the constitutional scope of federal jurisdiction, it has been held that it may leave certain matters to the provincial courts, although it might attribute them to the federal courts. The exact limits in this respect have not yet been clearly established.[118]

[111] Statute No. 27 of 1862, *supra* note 109.

[112] The distribution of the sectional judges at present is thus: six are sitting in the province of Buenos Aires, three each in the Federal Capital and the provinces of Santa Fe and Córdoba, two each in the provinces of Entre Ríos and Mendoza, and one each in the remaining nine provinces. For details see REPUBLICA ARGENTINA, PRESUPUESTO GENERAL DE LA NACION 386*ff.* (1943); 1 ALSINA, *op. cit. supra* note 106, at 391, and AQUINO Y BARILLATTI, *op. cit. supra* note 106, at 151*ff.*

[113] The organization of the courts of ordinary jurisdiction in the capital is based upon Statute No. 1893 of 1886, 3 LEYES NACIONALES 213 (1940). It has undergone a number of amendments, particularly by Statute No. 7055 of 1910, *id.* at 253. For details see 1 ALSINA, *op. cit. supra* note 106, at 403. The labor tribunals were created by Executive Decree No. 32347 of 1944, Buletin Oficial, Jan. 13, 1945, and made permanent by Statute No. 12948 of 1947.

[114] For details see 1 ALSINA, *op. cit. supra* note 106, at 410; AQUINO Y BARILLATTI, *op. cit. supra* note 106, at 155.

[115] Established by Presidential Decrees Nos. 4256 and 4257 of 1945, 5 ANALES DE LEGISLACCION ARGENTINA 79, 80.

[116] See the list in 1 ALSINA, *op. cit. supra* note 106, at 394, which must be supplemented by Statute No. 12680 of 1941 and Decree No. 4257 of 1945 creating one additional judgeship for the territories of Chaco and Chubut respectively.

[117] The basic statutes regulating federal jurisdiction are Statutes Nos. 48 and 50 of 1863, 3 LEYES NACIONALES 23*ff.* and 45*ff.* (1940) and Statute No. 4055 of 1902, *id.* at 31*ff.*

[118] Thus the Supreme Court of Justice has upheld Statute No. 927 of 1878, 3 LEYES NACIONALES 29*ff.* (1940), which excludes from the field of concurrent federal jurisdiction all suits involving less than 500 pesos, Vignale c. Albarracin, 36 Fallos de la S. C. 394 (1889), Pinto c. Moureaux, 53 Fallos de la S. C. 111 (1893); Ferrocarril Buenos Aires c. Sociedad E. Bertolina, 119 Fallos de la S. C. 161 (1914); Millan c. Caviglia, 152 Fallos de la S. C. 344 (1928). The Supreme Court has also declared recently that the adjudication of matters regulated by federal statute of general application may be left to the

b. *Jurisdiction conferred upon the inferior federal courts.* The original jurisdiction of the sectional judges is predicated either upon the character of the subject matter or of the parties.[119]

(1) The federal jurisdiction defined by the subject matter is exclusive.[120] According to Article 2 of Statute No. 48 of 1863, it includes all matters

> . . . which are governed specifically by the national constitution and the laws which Congress has enacted or may enact and by public treaties with foreign nations.[121]

Numerous difficulties are encountered in the interpretation of this article. Since a broad construction of the first clause would mean that whenever a constitutional issue is raised the provincial court loses jurisdiction, the Supreme Court of Justice has taken pains—not always consistently—to restrict its meaning to causes of action directly based on the constitution.[122] Otherwise the original federal jurisdiction would be unduly extended. The second clause has likewise required restrictive interpretation. Since the constitution itself excludes the four codes from the exercise of federal jurisdiction (absent other reasons for it),[123] the term "laws" in Article 2 of the statute of 1862 has been interpreted to apply only to "special" laws. Exactly what comes under this concept is a much debated question.[124] The statute governing bankruptcy has been considered a general law and not within the reach of federal jurisdiction.[125]

Original federal jurisdiction by reason of the character of the parties includes among others "civil suits in which the parties are an inhabitant of the province in which suit is brought and an inhabitant of another or in which the parties are an Argentine citizen and a foreigner."[126] The interpretation of this section has been much influenced by United States precedents. The statute itself requires for the acquisition of inhabitancy within the meaning of this section a continuous residence of two years, or the holding of real property or such establishment that the intent to remain is manifested.[127] The Supreme Court of Justice has declared that this

provincial courts. Caja Nacional de Jubilaciones y Pensiones c. Enrique P. Oses y otros, 190 Fallos de la S. C. 469 (1941). The position of the court is defended by GONDRA, *op. cit. supra* note 106, at 25*ff.* and criticized by 1 ZAVALIA, *op. cit. supra* note 106, at 419, 431.

[119] For discussions of the statutory provisions, see GONDRA, *op. cit. supra* note 106, at 1*ff.*; 1 ALSINA, *op. cit. supra* note 106, at 665*ff.*; 1 ZAVALIA, *op. cit. supra* note 106, at 371*ff.*

[120] Statute No. 48 of 1863, Art. 12, 3 LEYES NACIONALES 23*ff.* (1940). Conversely, the parties cannot bring non-federal matters before the federal courts by mutual agreement. Statute No. 50 of 1863, 3 *id.* at 45.

[121] See note 120 *supra.*

[122] Details are given in 1 ZAVALIA, *op. cit. supra* note 106, at 372*ff.*; GONDRA, *op. cit. supra* note 106, at 53 *ff.*; 2 PEREZ, *op. cit. supra* note 106, at 55*ff.*; 1 ALSINA, *op. cit. supra* note 106, at 665.

[123] CONST. 1853, Arts. 67(11) and 100, see parts 1 and 2, *supra.*

[124] See GONDRA, *op. cit. supra* note 106, at 63*ff.*; ALSINA, *op. cit. supra* note 106, at 667; 1 ZAVALIA, *op. cit. supra* note 106, at 381*ff.*

[125] GONDRA, *op. cit. supra* note 106, at 91*ff.*; 1 ZAVALIA, *op. cit. supra* note 106, at 389*ff.*; Statute of 1878 for an additional regulation of the jurisdiction and competence of the national tribunals, §2; Bankruptcy Act of 1933, Law No. 11719 Art. 52.

[126] Statute No. 48 of 1863, Art. 2(2), 3 LEYES NACIONALES 23 (1940).

[127] Statute No. 48 of 1863, Art. 11.

means the acquisition of domicile is necessary in all cases.[128] In addition it has limited the application of this article to Argentine citizens.[129] Inhabitants of the capital territory are by special statute assimilated to the inhabitants of a province.[130] Jurisdiction over this category is concurrent. Provincial jurisdiction attaches if the defendant denies the allegations of the complaint in a provincial court without contesting the jurisdiction.[131]

The federal Chambers of Appeal exercise appellate jurisdiction chiefly over the judgments of the sectional judges of first instance.[132]

c. *Appellate jurisdiction of the federal Supreme Court of Justice.* While the original jurisdiction of the federal Supreme Court is defined by the constitution, its appellate jurisdiction is statutory. Argentine procedural theory distinguishes between ordinary and extraordinary appeals. The former is a true appeal while the latter corresponds to a writ of error.[133] Ordinary appeals lie from the judgments of the Federal Chambers of Appeal in specifically enumerated cases of particular importance.[134] The extraordinary appeal lies from judgments of the Federal Chambers of Appeal, the Chambers of Appeal of the Federal District, and the Supreme Courts of the provinces to preserve the supremacy of the federal constitution, the federal statutes, and treaties in accordance with Article 31 of that instrument, which is a copy of the corresponding Article VI of the United States Constitution.[135] The prerequisites of these extraordinary appeals are regulated by Statute No. 48 of 1863, Article 14, which is in turn a close adaptation of the United States

[128] GONDRA, *op. cit. supra* note 106, at 223; 1 ZAVALIA, *op. cit. supra* note 106, at 422.

[129] Aspiazu y Bilbao c. Castagno, 1 Fallos de la S. C. 451 (1865); GONDRA, *op. cit. supra* note 106, at 222; 1 ZAVALIA, *op. cit. supra* note 106, at 421.

[130] Statute No. 1467 of 1884. See Demarchi c. Olmos, 29 Fallos de la S. C. 363 (1885). The constitutionality of this statute was not questioned in this case, in contrast to the attiude of our courts toward our similar statute of 1940. *See* Willis v. Dennis, 72 F. Supp. 853 (W. D. Va. 1947).

[131] Statute No. 48 of 1863, Art. 12(4).

[132] Statute No. 4055 of 1902, Arts. 15 and 16, 3 LEYES NACIONALES 31*ff.* (1940). The value of the litigation must exceed 500 pesos. For details see 1 ALSINA, *op. cit. supra* note 106, at 689*ff.*

[133] As to the jurisdiction of the Supreme Court of Justice in general, see 1 ALSINA, *op. cit supra* note 106, at 691*ff.* The difference between the ordinary and extraordinary appeals consists chiefly in the scope of review. The writ of extraordinary appeal, which was unknown to the Italo-Spanish concepts of procedure that govern Argentine law, was introduced in imitation of the old United States writ of error. 2 ALSINA, *supra*, at 642*ff.*

[134] Statute No. 4055 of 1902, Art. 1, 3 LEYES NACIONALES 31*ff.* (1940). It lies in such civil actions against the nation as are authorized by statute, actions against private persons in tax matters and cases involving certain crimes, extradition, and certain war measures. Suits against the nation in certain matters were first authorized by Statute No. 3952 of 1900, 3 LEYES NACIONALES 93 (1940), after the Supreme Court of Justice, following North American rather than Spanish precedent, had declared the nation to be immune from suit by private parties. Balmaceda c. Fisco Nacional, 6 Fallos de la S. C. 159 (1868); Nunez c. el Gob. Nacional, 12 Fallos de la S. C. 227 (1872). The subsequent Statute No. 11634 of 1932, 3 LEYES NACIONALES 94 (1940), extended the suability of the nation to civil suits generally, see 1 ALSINA, *op. cit. supra* note 106, at 680.

[135] The present basis of this review by the Supreme Court is Art. 6 of Statute No. 4055 of 1902, *supra* note 117. For details see 2 ALSINA, *op. cit. supra*, note 106, at 642; 1 ZAVALIA, *op. cit. supra*, note 106, at 257*ff*; Pecach, *Los modos de iniciación del controlar judicial de la constitucionalidad de las leyes en la Rep. Argentina*, 5 REVISTA UNIVERSITARIA JURIDICAS Y SOCIALES 150 (1939). As to the political efficacy of the institution of judicial review in recent political developments, see Zavilia, *Amparo judicial, su alcance y eficacia*, 1 REVISTA DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES (3d Ser.) 53 (1946).

Judiciary Act of 1789, Sec. 25,[136] which provided for writs of error to the Supreme Court under identical conditions.

5. Reform movements

The present system has recently been criticized as unsatisfactory and changes have been proposed. On the one hand, it has been suggested that the diversity jurisdiction is of no advantage and should be abolished. But Argentine theory has taken the position that Congress could not go so far without constitutional amendment.[137] On the other hand, it has been advocated that the Supreme Court be transformed into a national court of review for the purpose of eliminating the discordant interpretations given to the great national codes by the the provincial supreme courts.[138]

B. The United States of Brazil

1. General features of the constitutional system

Brazil declared her independence of the Crown of Portugal in 1822. Two years later the Empire of Brazil obtained a constitution.[139] In 1889 the republic was proclaimed, and in 1891 adopted its first constitution. It established a federal form of government, transforming the former imperial provinces into autonomous states.[140] Following the Vargas revolution of 1930 a new constitution was put in force in 1934,[141] and it in turn was superseded by another in 1937.[142] The present organic

[136] It provides: "Once a suit has been commenced in the provincial courts it must be decided and determined in the provincial jurisdiction, but the final judgments pronounced by the provincial courts can be appealed to the Federal Supreme Court in the following cases:

"1. if in the complaint the validity of a treaty, a Congressional statute or of an authority exercised in the name of the Nation was questioned and the decision was against the validity;

"2. if the validity of a statute, decree or authority had been questioned under the claim that it was repugnant to the national constitution, a treaty or the laws of Congress and the decision was in favor of the validity of the statute or authority;

"3. if the significance of any clause of the constitution or a treaty or a congressional statute or a commission exercised in the name of the national authority had been questioned and the decision went against the validity of the title, right, privilege and exemption which was founded upon these clauses and was a matter of the litigation."

Article 15 of the same act excludes specifically the codes mentioned in Article 67(11) of the constitution from the term "laws" as used in Article 14(3).

[137] See GONDRA, *op. cit. supra*, note 106, at 217*ff*., 219.

[138] See Rivarola, *La unidad de derecho en la Republica Argentina*, 15 REVISTA DEL COLEGIO DE ABOGADOS DE ROSARIO 53 (1944); COLOMBO, LA CORTE NACIONAL DE CASACION (2 vols. 1943).

[139] For the text of the constitution of 1824 see CONSTITUICOES DO BRASIL 5*ff*. (ed. by Marchese, 1944); for the history of its adoption see LEAL, HISTORIA CONSTITUCIONAL DO BRASIL (1915).

[140] For the text of the constitution of 1891 see CONSTITUICOES DO BRASIL, *supra*, note 139, at 37*ff*. The leading Brazilian commentaries are BARBALHO, CONSTITUICAO FEDERAL BRASILEIRA (2d ed. 1924); MAXIMILIANO, COMMENTARIOS A CONSTITUICAO BRASILEIRA (3 ed. 1929); BARBOSA, COMMENTARIOS A CONSTITUICAO FEDERAL BRASILEIRA (6 vols. 1934). A good English discussion is HERMAN G. JAMES, THE CONSTITUTIONAL SYSTEM OF BRAZIL (1923).

[141] For the text of the constitution of 1934 see CONSTITUICOES DO BRASIL, *supra* note 139, at 67. Its features are discussed in LEGON, REORGANIZACION DEL SISTEMA CONSTITUCIONAL DEL BRASIL (1935).

[142] For the text of the constitution of 1937 see CONSTITUICOES DO BRASIL, *supra* note 139, at 129. Its features are discussed in ARAUJO CASTRO, A CONSTITUICAO DE 1937 (1938) and PONTES DE MIRANDA, COMMENTARIOS A CONSTITUICAO DE 10 DE NOVEMBRO DE 1937 (3 vols. 1938). See also PEREIRA DE VASCONCELLOS, CONSTITUICAO DOS E. U. DO BRASIL, INTERPRETADA PELO DO SUPREMO TRIBUNAL FEDERAL (1944).

charter was promulgated on September 18, 1946.[143] The United States of Brazil form a federal union comprising twenty states,[144] the federal district constituting the capital,[145] and the territories.[146]

The powers of the union are enumerated by the constitution.[147] Its legislative competence extends to civil, commercial, penal, procedural, aviation, and labor law.[148] The states retain all powers which are not implicitly or expressly prohibited by the constitution.[149] The union possesses full powers in respect to the administration of the federal district and the territories.[150]

2. *The eclipse of the system of a dual jurisdiction and a dual judiciary*[151]

The constitution of 1891 was greatly influenced by those of the United States and Argentina. It provided, accordingly, for a federal jurisdiction and a dual judiciary. The judicial power was vested in a Supreme Federal Tribunal and as many federal judges and tribunals as Congress chose to create.[152] Federal jurisdiction was regulated much along the same lines as in the United States and Argentina.[153] The original jurisdiction of the lower federal courts was predicated upon either the subject matter or the character of the parties to the suit, including litigation between citizens of different states.[154] The original jurisdiction of the Federal Supreme Tribunal consisted of the familiar categories, and its appellate jurisdiction extended not only over the lower federal courts, but also over the state supreme courts.[155] In the latter case appeals lay only to safeguard the supremacy of the federal constitution and statutes, under conditions similar to those specified by the United States Judiciary Act.[156]

[143] 12 ANNUARIO DE LEGISLACAO FEDERAL 1004 (1946).

[144] The names of the States are Alagõas, Amazones, Bahia, Ceará, Espirito Santo, Goías, Maranhão, Mato Grosso, Minas Gerais, Pará, Paraíba, Paraná, Pernambuco, Piauí, Rio de Janeiro, Rio Grande do Norte, Rio Grande do Sul, Santa Catarina, São Paolo and Sergipe.

[145] CONST. 1946, Art. 1, §2.

[146] The territories are Acre, Fernando de Noranha, Amapá, Rio Branco, Guaporé, Ponta Parã and Iguaçu. With the exception of Acre, which was acquired in 1903, they were established in 1942 and 1943.

[147] CONST. 1946, Art. 5.

[148] *Id.* Art. 5, XV, a.

[149] *Id.* Art. 18, sec. 1.

[150] *Id.* Art. 25.

[151] Excellent surveys of the development of federal justice in Brazil are given by Justice Castro Nunes in his great treatise, TEORIA E PRATICA DO PODER JUDICIARIO, 58*ff.* (1943), and by Nunez Leal, *Organização judiciária dos territórios*, 1 REVISTA DE DIREITO ADMINISTRATIVO 789*ff* (1945).

[152] CONST. 1891, Art. 55. Even before the adoption of the constitution the republican government had established a Supreme Tribunal and twenty-one federal courts (one for each state and one for the capital). Decree No. 848 of 1890, amplified by Decree No. 1420A of 1891. This organization was retained, and all rules and regulations concerning organization and administration of federal justice were consolidated by Decree No. 3084 of 1898, COLECCAO DAS LEIS DA REPUBLICA DOS E. U. DO BRASIL, 779*ff.* (1898).

[153] For details see LESSA, DIREITO CONSTITUCIONAL BRASILEIRO: DO PODER JUDICIARIO (2d ed., 1915), and BARBALHO, *op. cit. supra*, note 140, at 313*ff.*

[154] CONST. 1891, Art. 60. Federal jurisdiction because of the subject matter was not predicated, however, simply on the fact that the litigation was based on a federal statute. To come within federal jurisdiction the suit had to involve a claim or defense founded on the constitution. This concept created great difficulties.

[155] CONST. 1891, Art. 59.

[156] *Id.*, Art. 59, §§1 and 2.

The constitutional provisions gave rise to numerous doubts and proved unsatisfactory. Consequently, this portion of the constitution was amended in 1926 for the purpose of eliminating the difficulties. The most significant change was the abolition of federal jurisdiction in diversity of citizenship cases.[157]

The 1934 constitution, in spite of its centralizing and authoritarian tendencies, retained the dual jurisdiction on the insistence of some states.[158] Its major innovation in the administration of justice was the grant to the federal government of power to enact rules of procedure applicable in the state courts. Otherwise no material changes were made except that the appellate jurisdiction of the Supreme Court was extended to review by writ of error (called *recurso extraordinario*) of decisions rendered by the state courts in violation of the literal terms of a federal statute.[159] The constitution of 1937, however, made a radical break with tradition. It eliminated all lower federal courts except in the federal district and the territories.[160] The state courts were listed as organs of the judicial power of the nation, thus manifesting the trend toward the national state.[161]

3. *The present scope and organization of federal justice*

a. *The organization of the federal courts.* The framers of the new constitution of 1946, while reemphasizing democratic principles, did not feel it necessary to restore lower federal courts of the old type. Apart from the electoral and the military tribunals, the constitution vests the judicial power of the national government in three types of courts: (1) the Federal Supreme Tribunal, (2) the Federal Tribunal of Appeals, and (3) labor tribunals.[162] The Federal Supreme Tribunal has its seat in the capital and is staffed by eleven justices; their number can be increased by statute upon request of the tribunal.[163] The Supreme Tribunal of Appeals likewise sits in the capital and is composed of nine members.[164] The labor tribunals form three sets of courts, viz., the Superior Labor Tribunal, regional labor tribunals as determined

[157] One of the other important changes made was the extension of the appellate jurisdiction of the Supreme Tribunal to situations in which two or more state courts had interpreted the same federal statute in different ways, Arts. 59-60, III, §1, c, in the form of the amendment of Sept. 3, 1926. Considering the fact that civil, commercial, and criminal law were controlled by federal codes, this extension was of great significance. For details see MAXIMILIANO, *op. cit. supra*, note, 140, at 623*ff*; CASTRO NUNES, *op. cit. supra*, note 151, at 377.

[158] See ARAUJO CASTRO, *op. cit. supra*, note 142, at 200.

[159] CONST. 1934, Art. 76, III, a.

[160] CONST. 1937, Art. 90. The extinction of the lower federal courts was perfected by the Decree-Law No. 6 of 1937, 3 COLECCAO DAS LEIS DO BRASIL, 311 (1937); *cf.* CASTRO NUNES, *op. cit. supra*, note 151, at 73*ff*, 78.

[161] See CAMPOS, O ESTADO NACIONAL (3d ed. 1941).

[162] CONST. 1946, Art. 94. The "Tribunal of Accounts" which is established by the Constitution of 1946, Art. 76, for the control of governmental expenditures (Arts. 22 and 77) does not constitute part of the judicial branch. While it exercises supervision in a judicialized form, its activities are comparable to those of the Comptroller-General in the United States, being executive in character. CASTRO NUNES, *op. cit. supra*, note 151, at 22*ff*; see also in general CARL J. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 407*ff*. (1941).

[163] CONST. 1946, Art. 98.

[164] *Id.*, Art. 103.

by statute, and conciliation and arbitration commissions.[165] In addition, the federal district[166] and the territories[167] have a separate federal judiciary. The constitution contains rigid standards for the appointment and tenure of the state judges, and guarantees impartial judicial process to all residents.[168]

b. *The jurisdiction of the federal courts.* Only the jurisdiction of the Federal Supreme Tribunal and of the Tribunal of Appeals will be outlined, in as much as the jurisdiction of the federal courts of general jurisdiction in the federal district and the territories and that of the labor courts are separately controlled by special statutes.[169]

(1) The Federal Supreme Tribunal exercises either original or appellate jurisdiction. The former extends to eleven specifically enumerated classes of cases, which include criminal prosecutions of certain high foreign or domestic officials and the revision of convictions in these cases; suits between foreign states on the one side and the union, the states, the federal district, or municipalities on the other; suits between the states or between the nation and the states; jurisdictional conflicts between state courts, between federal courts, or between state and federal courts; extraditions requested by foreign states; and, finally, writs of habeas corpus or mandamus, and injunctions against certain high officials.[170]

The appellate jurisdiction of the Federal Supreme Tribunal is exercised either in "ordinary" appeals or by writs of error.[171] Appeals are permitted (1) from denials by courts of last resort of writs of habeas corpus and mandamus,[172] (2) from judgments of local courts concerning either claims based on a treaty with a foreign nation or suits between foreign states and inhabitants of Brazil, and (3) from judgments in prosecutions for political crimes.[173]

[165] *Id.*, Art. 122. The labor tribunals are now regulated in detail by Decree-Law No. 9797 of 1946 (ANNUARIO DE LEGISLACAO FEDERAL, 894 (1946)), amending the Consolidação das leis do trabalho; Decree-Law No. 5425, 5 COLECCAO DAS LEIS DO BRASIL, 240 (1943).

[166] The administration of justice in the Federal District is regulated by the Código de Organização Judiciaria do Distrito Federal, Decree-Law No. 8527 of 1945, 1 COLECCAO DAS LEIS DO BRASIL 578*ff* (1946), providing for a Tribunal of Appeal, now called Tribunal of Justice, composed of twenty-seven judges sitting in eight divisions, a tribunal for the press, a number of single judges of first instance, and a jury.

[167] The administration of justice in the territories is regulated by Decree-Law No. 6887 of 1944 (7 COLECCAO DAS LEIS DO BRASIL, 296, (1944)), which establishes various judicial districts and provides for a single judge, a press tribunal, a jury, and justices of the peace in each of them. See NUNEZ LEAL, *op. cit. supra*, note 151.

[168] See CONST. 1946, Art. 124, Art. 7, VII, g (federal intervention in case of non-compliance), and Art. 141.

[169] See notes 165-167 *supra*.

[170] CONST. 1946, Art. 101, I, a to k. For the development of the original jurisdiction of the Supreme Federal Tribunal, see CASTRO NUNES, *op. cit. supra*, note 151, at 213*ff*.

[171] As to the development of and difference between ordinary and extraordinary recourses (appeals and writs of error) see CASTRO NUNES, *op. cit. supra*, note 151, at 287*ff*, 309*ff*, and FRAGA, INSTITUICAOS DO PROCESSO CIVIL DO BRASIL 256*ff* (1941).

[172] The *mandada de segurança*, which combines the functions of the writ of mandamus and an injunction against public officers, was introduced into Brazilian law in 1934. See ARAUJO CASTRO, *op. cit. supra*, note 142, at 383*ff*, and CASTRO NUNES, DO MANDADO DE SEGURANCA E OUTROS MEIOS DE DEFESA DO DIREITO CONTRA ACTOS DO PODER PUBLICO (1937).

[173] CONST. 1946, Art. 101, II.

Judgments rendered by courts of last resort are reviewable upon writ of error in four classes of cases, viz.:

(a) when the decision is contrary to a provision of the constitution or the terms of a treaty or federal statute,

(b) when the validity of a federal law has been questioned in view of the constitution and the decision below denied the applicability of the attacked statute,

(c) when the validity of the statute or act of a local government has been contested in view of the constitution or federal law and the decision below upholds the statute or act, and

(d) when in the decision below the interpretation of a federal statute is different from that which was given to it by another court or the Federal Supreme Tribunal itself.[174]

(2) The Federal Tribunal of Appeals has jurisdiction to issue writs of mandamus or injunctions against the ministers of state, and to hear appeals from cases in which the federal government is a party, or in which writs of habeas corpus or writs of injunction or mandamus against federal authorities have been denied.[175]

C. The United States of Mexico

1. *General features of the constitutional system*

The constitutional organization of Mexico has undergone a stormy development.[176] The first constitution based on democratic and federal principles was adopted in 1824.[177] It remained in force for only eleven years but, after various experiments with unitarian schemes, was restored in 1846. Its reign was again of short duration, however, due to the dictatorship of Santa Anna. The revolt of Ayutla resulted finally in the adoption of the liberal constitution of 1857, which was replaced by the present constitution of 1917.[178]

The federation is composed of twenty-eight states,[179] the federal district, and three territories.[180] The federation also possesses jurisdiction over all islands not under the actual control of a state.[181] The federal government is divided into the

[174] *Id.*, Art. 101, III, a to d. As to the construction of the analogous clauses in the constitution of 1937 see CASTRO NUNES, *op. cit. supra*, note 151, at 353*ff*.

[175] CONST. 1946, Art. 104.

[176] On the constitutional history of Mexico, see CAMPILLO CAMARILLO, TRATADO ELEMENTAL DE DERECHO CONSTITUCIONAL MEXICANO (1928), XV*ff*, and JOHN T. VANCE AND HELEN L. CLAGETT, A GUIDE TO THE LAW AND LEGAL LITERATURE OF MEXICO 161*ff* (1945).

[177] On the early history of federalism in Mexico, see MARTINEZ PALAFOX, LA ADOPTION DEL FEDERALISMO EN MEXICO (1945).

[178] The constitution of 1917 has been amended several times pursuant to the procedure specified in Art. 135. For a recent text see TRUEBA URBINA, CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS (3d ed. 1946), which, however, does not incorporate the amendment of Dec. 16, 1946, regarding Art. 104, Diario Oficial Dec. 30, 1946.

[179] Their names are listed in Art. 43 of the Constitution, 1917: Aguascalientes, Campeche, Coahuila, Colima, Chiapas, Chihuahua, Durango, Guanajuato, Guerrero, Hidalgo, Jalisco, México, Michoacán, Morelos, Nayarit, Nueva León, Oaxaca, Puebla, Querétaro, San Luis Potozí, Sinaloa, Sonora, Tabasco, Tamaulipas, Tlaxacala, Veracruz, Yucatán and Zacatecas.

[180] CONST. 1917, Arts. 43 and 45: Territorio Norte de la Baja California, Territorio Sur de la Baja California, and Quintana Roo.

[181] *Id.*, Art. 48.

three traditional branches. Its legislative powers are specifically enumerated.[182] The constitution provides expressly for the adoption of a commercial code but makes no such reference to a civil code.[183] The federal government has full legislative powers in the federal district and the territories.[184]

2. *Constitutional provisions as to the judicial power*

The judicial power of the federation is regulated in Title III, Chapter IV of the constitution. It is lodged in a Supreme Court of Justice, Circuit Tribunals, and District Judgeships, the number and functions of which are fixed by statute.[185] The Supreme Court of Justice is composed of twenty-one justices who sit *in banco* or in four divisions as determined by statute. Since 1940 the Supreme Court of Justice has exercised supervision over the lower federal courts.[186]

The constitutional scope of federal jurisdiction is governed by Articles 103 and 104.[187] The former vindicates the supremacy of the constitution in regard to both the federal structure and the guarantees of civil rights.[188] The latter defines the other controversies which the framers wished to confide to the federal courts because of the subject matter or the parties involved.[189] Suits between a state and the inhabitants of another state are within the ambit of federal jurisdiction, but suits between citizens of different states are not. Controversies involving compliance with, or the application of, a federal statute or treaty which affects only private interests may be

[182] *Id.*, Art. 73 (I-XXIX).

[183] *Id.*, Art. 73(X). The Federal Civil Code of 1932 which applies in all of Mexico is therefore specifically restricted to federal matters.

[184] *Id.*, Art. 73 (VI).

[185] *Id.*, Art. 94.

[186] CONST. 1917, Art. 97, as amended in 1940. Diario Oficial No. 9, 1 (1940).

[187] For a discussion of details, see LANZ DURET, DERECHO CONSTITUCIONAL MEXICANO 291*ff* (1936).

[188] Art. 103 of the Constitution, 1917, provides: "The tribunals of the Federation shall determine every controversy which arises:

"I. because of laws or acts of federal authorities which violate civil liberties guaranteed by the constitution;

"II. because of laws or acts of federal authorities which violate or encroach upon the sovereignty of the states; and

"III. because of laws or acts of authorities of the latter which invade the sphere of federal authority."

[189] Art. 104 provides: "The tribunals of the Federation shall take cognizance

"I. of all civil or criminal controversies which arise about the compliance with or application of federal statutes or out of treaties concluded with foreign powers. If such controversies affect only private interests the local judges and tribunals of general jurisdiction in the states, the Federal District and the territories may take cognizance thereof at the election of plaintiff. The judgments of first instance are appealable to the immediate superior of the judge who has decided the suit in first instance.

"In the suits in which the Federation has an interest the law may prescribe appeals to the Supreme Court of Justice against the judgments of second instance or against judgments of administrative tribunals created by federal statute, provided that these tribunals are endowed with full independence to render their decisions;

"II. of all controversies involving maritime law;

"III. of those in which the Federation was a party;

"IV. of those which arise between two or more states, or between a state and the Federation, as well as of those which arise between the tribunals of the Federal District and those of the Federation or a state;

"V. of those which arise between a state and one or more inhabitants of another;

"VI. of the suits concerning a member of the diplomatic or consular corps."

adjudicated, at the election of the plaintiff, by the judges of federal jurisdiction or by the ordinary courts of justice.

The original jurisdiction of the Supreme Court of Justice extends to controversies between states, between the states and the federation, and all other suits to which the federation is a party.[190] The Supreme Court also determines disputes between the authorities of one state about the constitutionality of their acts,[191] and jurisdictional disputes between various federal courts, or federal and state courts, or courts of different states.[192]

Article 107 gives rules for the vindication by judicial action of constitutional supremacy as provided in Article 103. This method is a proceeding, peculiar to the Mexican system, called the writ of *amparo,*[193] the details of which are governed by statute.

3. Statutory provisions as to the organization of the federal courts

The statute regulating the organization of courts is the Organic Law for the Judicial Power of the Federation of 1935.[194] The national territory is divided into six circuits, each of which is the seat of a Circuit Tribunal (with one judge) and of a varying number of district judgeships.[195] The Supreme Court of Justice exercises its original jurisdiction under Article 105 *in banco*; in all other cases it acts through one of the four divisions.[196] A Fiscal Tribunal of the Federation was added to the federal judiciary in 1936.[197] Following the example of Argentina, federal jurisdiction and ordinary jurisdiction are separate even in the federal district and the territories. The latter is regulated by a statute of 1932[198] which establishes a Superior

[190] The nation must be a party not in its capacity as "authority" but as "person." Vásquez Vallejo c. Gov. Fed., 81 SEMANARIO JUDICIAL, 6015 (1941).

[191] CONST. 1917, Art. 105. [192] *Id.*, Art. 106.

[193] The Mexican literature on the writ of *amparo* is extensive. See VANCE AND CLAGETT, *op. cit. supra,* note 176, at 172ff. The classical treatises are CASTILLO, TEORIA DEL RECURSO DE AMPARO (1901); MORENA CORA, TRATADO DEL JUICIO DE AMPARA CONFORME A LAS SENTENCIAS DE LOS TRIBUNALES FEDERALES (1902); CORTES, EL JUICIO DE AMPARO AL ALCANCE DE TODOS (1908). Also illuminating is Vega, *El juicio de amparo y el recurso de casacion Frances* (1889), reprinted in 8 REVISTA DE LA ESCUELA NACIONAL DE JURISPRUDENCIA, 213 (1946). More modern treatments are DE LEON, MANUAL DE PROCEDIMIENTO CIVIL 64ff (1934); COUTO, LA SUSPENSION DEL ACTO RECLAMADO EN EL AMPARO (1929); Moreno, *La sentencia del amparo,* 1 JUS, REVISTA DE DERECHO Y CIENCIAS SOCIALES, No. 2, 35 (1938); DE LEON, MANUAL Y LEY DE AMPARO (1940). The most significant discussions of the writ are contained in the report of the third division of the federal Supreme Court of Justice in INFORME RENDIDO A LA SUPREMA CORTE DE JUSTICIA (1941), and the report of the committee of justices, entitled *El problema del rezago de juicios de amparo en materia civil,* in INFORME RENDIDO A LA SUPREMA CORTE DE JUSTICIA (1946).

[194] Diario Oficial No. 8 (Jan. 10), 1ff (1936).

[195] Ley orgánica del Poder Judicial de la Federación, Art. 71ff. The six circuit tribunals sit at Mexico City, Aguascalientes, Monterey, Guadalajara, Puebla City, and Merida City. The total number of district judgeships at present is forty-six, the Federal District having six federal judges and each state at least one.

[196] Ley orgánica del Poder Judicial, Art. 11. *Cf.* WHELESS, COMPENDIUM OF THE LAWS OF MEXICO 530 (2d ed. 1938).

[197] Ley de Justicia Fiscal of Aug. 27, 1936. The position and jurisdiction of this court are now defined by the Código fiscal de la federacion of 1938, Arts. 146 and 160.

[198] Ley orgánica de los tribunales de justicia del fuero común del Distrito y territorios federales, 75 DIARIO OFICIAL, No. 53, 2 (1932). The statute has been amended several times.

Court of Justice for the federal district and one Superior Tribunal each for Northern and Southern Lower California, and provides for a variety of judicial officers of inferior jurisdiction. The federal courts and the courts of ordinary jurisdiction in the federal district and the territories observe different rules of procedure.[199]

4. *Statutory provisions regulating federal jurisdiction*

In addition to and in pursuance of the constitutional provisions, the federal jurisdiction (in the technical sense) is regulated by two statutes, viz., by the above mentioned *Ley orgánica del poder judicial* of December 30, 1935, and by the *Ley orgánica de los Artículos 103 y 107 de la Constitución Federal,* called *Ley de amparo,* of the same date.[200] The first statute sets forth in detail the jurisdiction of the district judges over criminal, civil, and administrative litigations,[201] that of the Circuit Tribunals, which is chiefly appellate,[202] and that of the Supreme Court of Justice,[203] the appellate jurisdiction of which was recently augmented by giving to it the appeals listed in Article 104(T), Par. 2. of the Constitution.[204]

The jurisdiction in *amparo* is controlled by the separate statute mentioned. The bulk of the business of the federal courts and of the Supreme Court in particular is formed by proceedings under the *Ley de amparo.*[205] The office of the writ, as we have said, is the prevention of infringements upon the federal structure and of the civil liberties guaranteed by the constitution.[206] One of these liberties is embodied in a provision similar to our due process clause with the specific addition that "civil judgments must be in conformity with the letter or the juridical interpretation of the statutes or in the absence thereof be based upon the general principles of law."[207] Logically, therefore, any incorrect judgment constitutes a violation of this constitutional guaranty which can be vindicated by the writ of *amparo.* The Supreme Court of Justice, indeed, has reached this conclusion. As a result the federal judiciary, particularly the Supreme Court itself,[208] has gradually become "an organ of control

[199] They are contained in the Código de procedimientos civiles para el Distrito federal y territorios of Aug. 30, 1932, and the Código federal de procedimientos civiles of Dec. 31, 1942, 131 DIARIO OFICIAL, No. 45 (1943).

[200] DIARIO OFICIAL (Jan. 10, 1936). *Cf.* WHELESS, *op. cit. supra,* note 196, at 536.

[201] Ley orgánica del Poder Judicial Arts. 41, 42, 43, 44, 45. *Cf.* WHELESS, *op. cit. supra,* note 196, at 532.

[202] *Id.,* Art. 36; *cf.* WHELESS, *op. cit. supra,* note 196, at 531.

[203] *Id.,* Arts. 11, 24, 25, 26, 27.

[204] See note 189 *supra.* The significance of this amendment is discussed by Carrillo Flores, *La significacion de una reciente reforma constitucional,* 9 REVISTA DE LA ESCUELA NACIONAL DE JURISPRUDENCIA, No. 33, 9 (1947).

[205] The business of the federal courts is classified in the judicial statistics contained in the annual *Informe* issued by the Supreme Court of Justice.

[206] See note 192 *supra,* and text. Civil liberties were suspended during the war by decree of June 1, 1942, but restored by law of Sept. 28, 1945. DIARIO OFICIAL (Dec. 28, 1945).

[207] CONST. 1917, Art. 14, par. 4.

[208] According to the statute the writ of *amparo* lies either in the Supreme Court in the first instance (*amparo directo*) or goes there on review (*amparo en revision*); *cf.* the headings of the Supreme Court cases in the official reports called *Semanario Judicial.* Five decisions by the Supreme Court of Justice to the same effect, not interrupted by a contrary holding, are binding on all lower courts. Ley de amparo, *supra* note 200, Arts. 193, 194; *see also* VANCE AND CLAGETT, *op. cit. supra,* note 193, at 177; WHELESS, *op. cit. supra,* note 196, at 542.

of the legality of all acts of the authorities of the whole country," and a "veritable centralization of justice"[209] has taken place. To remedy this condition a radical reform of the pertinent provisions of the constitution and the statute regulating the writ has been projected.[210]

D. The United States of Venezuela

1. *General features of the constitutional system*

The constitutional history of Venezuela vascillates between periods of unitarian and federal organization.[211] The birth of the present federation is officially set at 1858. The style of "United States of Venezuela" was first adopted in the constitution of 1864.[212] A number of constitutions succeeded one another. The present organic charter was adopted on July 5, 1947.[213] According to this constitution[214] the United States of Venezuela is composed of twenty states,[215] the federal district containing the capital,[216] the federal territories,[217] and federal dependencies.[218]

The constitution regulates the powers of the states[219] and of the nation.[220] The states retain all non-delegated powers,[221] but their legislatures and executives[222] must comply with certain prescribed standards of organization. The powers of the nation are divided into the traditional three branches. The subjects of national legislation are specifically enumerated[223] and include the administration of justice, civil, commercial, penal, and procedural law, and all other matters which the constitution attributes to the national government.[224]

2. *Constitutional provisions as to the judicial power*

Until the adoption of the constitution of 1945, which has been superseded by the present constitution, the states were responsible for the administration of justice on the lower level. The federal government merely participated through the high-

[209] These are the observations of the court itself in the committee report of 1946, *supra*, note 193, at 65.

[210] See the memoranda by the Supreme Court in 1941 and 1946, *supra* note 193.

[211] *Cf.* PERERA, HISTORIA ORGANICA DE VENEZUELA (1943); GIL FORTOUL, HISTORIA CONSTITUCIONAL DE VENEZUELA (3 vols., 3d ed. 1942); OROPEZA, EVOLUCION CONSTITUCIONAL DE NUESTRA REPUBLICA (1944).

[212] The texts of the various Venezuelan constitutions from 1811 to 1936 are reprinted in PICON RIVAS, INDICE CONSTITUCIONAL DE VENEZUELA (1944). For a summary see CLAGETT, A GUIDE TO THE LAW AND LEGAL LITERATURE OF VENEZUELA 59*ff*. (1947).

[213] Gazeta Oficial, July 30, 1947, No. 194 Extra.

[214] CONST. 1947, Art. 2.

[215] They are Anxoátegui, Apure, Aragua, Barinas, Bolívar, Carabobo, Cojedes, Falcón, Guárico, Lara, Mérida, Miranda, Monagas, Nueva Esparta, Portuguesa, Sucre, Táchira, Trujillo, Yaracuy, Zulia.

[216] Pursuant to the Constitution of 1947, Art. 5, its administration is regulated by the Ley orgánica del Distrito Federal of Oct. 14, 1936, as amended in 1937. COMPILACION LEGISLATIVA DE VENEZUELA 830 (ed. by Pulido Villafañe and others, 1940).

[217] Amazonas and Delta Amacuro, CONST., 1947, Art. 7. Their administration is regulated by statutes of 1940. See note 235, *infra*.

[218] All islands except Coche, Margarita, and Cubagua, which form Nueva Esparta. CONST. 1947, Art. 9. Their administration is governed by statute of 1938, note 236 *infra*.

[219] *Id.*, Tit. VI.

[220] *Id.*, Tit. VII.

[221] *Id.*, Art. 120.

[222] *Id.*, Tit. VI, c. 2, §§1 and 2.

[223] *Id.*, Art. 138.

[224] *Id.*, Arts. 138, 4, 25 and 26.

est tribunal, called the Federal and Review Court,[225] some special tribunals, and the courts of general jurisdiction for the federal district and the territories.

The constitution of 1945 provided for the *nationalization of the whole administration of justice*.[226] The present constitution operates on the same principle. The states have no constitutional power to establish a judiciary, and the administration of justice is listed among the subjects of national legislation.[227]

The new constitution provides specifically that "the judicial power of the Republic is independent of the other Public Powers and constituted by the Supreme Court of Justice and the other Tribunals which the law establishes."[228]

The Supreme Court of Justice is composed of ten justices who may sit in divisions according to statutory regulation.[229] Its jurisdiction, original and appellate, is specifically enumerated under thirteen heads, which include appeals and all other writs which are conferred upon it by statute and "all other attributions which are assigned to it by the constitution and states on subjects of national power."[230]

3. *Statutory provisions regulating the organization and jurisdiction of courts*

The abolition of the state courts has not yet been effected.[231] The organization and jurisdiction of the Supreme Court, except in so far as they are altered by the new constitution, are still regulated by the Organic Law of the Federal and Review Court of 1945.[232] In addition, special labor tribunals[233] and tax courts[234] have been established. Separate statutes have been passed for the regulation of the administration of justice in the federal district,[235] the federal territories,[236] and the federal dependencies.[237]

[225] Corte Federal y de Casacion. The name and the functions of this court have varied with the different constitutions.

[226] As to the movement towards nationalization of the administration of justice, see RUGGERI PARA, LA JUSTICIA CENTRALIZADA (1944), HERNANDEZ RON, LA NACIONALIZACION DE LA JUSTICIA EN VENEZUELA (1944), 2 WOLF, TRATADO DE DERECHO CONSTITUCIONAL VENEZOLANO 340 (2 vols. 1945).

[227] See the provisions concerning the organization of the states and the legislative powers of the nation, *supra*, notes 221, 223, and text.

[228] CONST., 1947, Art. 211. [229] *Id.*, Arts. 218, 220. [230] *Id.*, Art. 220(3) and (13).

[231] *Cf.* the temporary regulation by Decree No. 87 of December, 1945, DECRETOS Y RESOLUCIONES DE LA JUNTA REVOLUCIONARIA DE GOBIERNO 124 (1946).

[232] Ley orgánica de la Corte Federal y de Casacion, Gazeta Oficial Aug. 27, 1945, No. 21796. The planned companion statute, Ley orgánica del Poder Judicial, was never promulgated because of the revolution of 1945. The court sits either *in banco* or in two divisions called Federal Chamber and Appeal Chamber. The court reviews all applications of federal statutes, Ley orgánica, Art. 15(6). Its decisions are reported in the annual *Memoria de la Corte Federal y de Casacion* and in the *Gazeta Oficial*.

[233] Ley orgánica de tribunales y de procedimiento de trabajo of 1940 (1940), 63(2) RECOPILACION DE LEYES Y DECRETOS 215, which establishes a Superior Labor Tribunal and various Labor Tribunals.

[234] Ley orgánica de la Hacienda Nacional of 1934, in the form of the amendment of 1947, *Gazeta Oficial*, July 30, 1947, No. 195 Extra, which provides for a special Superior Tribunal and National Tax Judges (Art. 273).

[235] Ley orgánica de los tribunales del Distrito Federal of 1936 as amended in 1939 and 1943, 66 RECOPILACION DE LEYES Y DECRETOS 563. The administration of justice in the district is confided to a Supreme Court, a Superior Civil and Commercial Court, a Superior Criminal Court, five judges of first instance, three divisional judges of limited jurisdiction, and other specialized judicial personnel.

[236] Ley orgánica del Territorio Federal Delta Amacuro, 1940, 63(2) RECOPILACION DE LEYES Y DECRETOS 55; Ley orgánica del Territorio Federal Amazonas, 1940, *id.* at 170.

[237] Ley orgánica de las Dependencias Federales, 1938, 63(3) RECOPILACION DE LEYES Y DECRETOS 45 (1940).

III

FEDERATIONS IN EUROPE AND ASIA

A. The Swiss Confederation

1. *General features of the constitutional system*

The Swiss Confederation boasts the oldest federal tradition of any existing government. Its origin goes back to the celebrated compact of 1291 between Uri, Schwyz, and Unterwalden.[238] The present constitution dates from May 29, 1874, but has undergone a number of amendments.[239] The confederation is composed of twenty-two sovereign cantons.[240] No federal district or federal territories exist. The legislative powers of the confederation are specifically enumerated and extend to the whole field of private, commercial, bankruptcy, and criminal law.[241]

2. *Constitutional provisions as to the judicial power*

The constitution specifically provides for the establishment of a Federal Court and a Federal Administrative Court,[242] the organization of which is left to statute.[243] The Federal Court is given jurisdiction in a number of specifically listed civil,[244] criminal,[245] and constitutional[246] matters. The last include the violation of the civil rights guaranteed by the constitution, but it is expressly declared that the statutes and resolutions passed by the Federal Diet and all treaties ratified by it are binding upon the courts.[247] These rules are supplemented by two important catch-all clauses. On the one hand, the Federal Court must take jurisdiction over cases which both

[238] For the evolution of Swiss constitutional law see HILTY, DIE BUNDESVERFASSUNGEN DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT (1891); HIS, GESCHICHTE DES NEUERN SCHWEIZERISCHEN STAATSRECHTS (3 vols., 1920); HEUSLER, SCHWEIZERISCHE VERFASSUNGSGESCHICHTE (1920).

[239] The present form is printed in 1 NEUES RECHTSBUCH DER SCHWEIZ 1*ff*. (ed. by the Chancellery of the Confederation, 2 vols., 1946). The leading commentary on the constitution is BURCKHARDT, KOMMENTAR DER SCHWEIZERISCHEN BUNDESVERFASSUNG (3d ed. 1931).

[240] CONST. 1874, Art. 1. They are Zurich, Bern, Luzern, Uri, Schwyz, Unterwalden, Glarus, Zug, Freiburg, Solothurn, Basel, Schaffhausen, Appenzell, St. Gallen, Grisons, Aargau, Thurgau, Ticino, Vaud, Valais, Neuchâtel, and Geneva.

[241] *Id.*, Arts. 64 and 64 bis. [242] *Id.*, Arts. 106 and 114 bis. [243] *Id.*, Art. 107.

[244] *Id.*, Art. 110. "The Federal Court adjudicates civil controversies

"1. between the confederation and the cantons;

"2. between the confederation on the one side and corporations or individuals on the other, if the object of the litigation is of significance as determined by law and the corporations or individuals are plaintiffs;

"3. between the cantons;

"4. between the cantons on the one side and corporations or individuals on the other, if the object of the litigation is of sufficient significance as determined by law and if one of the parties requests it. . . ."

[245] *Id.*, Art. 112. [246] *Id.*, Art. 113.

[247] *Id.*, Art. 113, last paragraph. The Federal Court is not only denied the power to declare federal statutes or resolutions unconstitutional, but is also severely restricted in its jurisdiction over complaints based upon a violation of the constitutional rights of citizens. The federal statute on the organization of the federal administration of justice of 1943, note 252 *infra*, Art. 84a, confers jurisdiction only in respect to ordinances or decrees by officials of the *cantons*. Complaints against decisions or orders of *federal* agencies or departments are decided by the Federal Council, *id.*, Art. 124, except in cases in which the jurisdiction of the Federal Court is expressly prescribed by the Act, Arts. 97-99. On the whole question, see the references in Schoch, *Conflict of Laws in a Federal State, The Swiss Experience*, 55 HARV. L. R. 738, 749, notes 60-61 (1942); RUCK, SCHWEIZERISCHES STAATSRECHT 133*ff* (2d ed. 1939).

parties submit to it, if the object is of sufficient significance as defined by statute.[248] On the other hand, the Federal Diet is given power to add further cases to the jurisdiction of the court, especially such functions as are necessary for the uniform application of the laws on the subjects mentioned above.[249] It is, however, expressly provided that the cantons retain control over the organization and procedure of their courts.[250]

The organization and jurisdiction of the Administrative Court are left to statutory regulation.[251]

3. *Statutory provisions as to the organization of the federal courts*

The organization of the Federal Court, envisaged by the constitution, is regulated by the recent revision and codification of the law on the organization of federal justice of 1943.[252] No separate administrative court has been established; its functions have been conferred upon the Federal Court. There exists, however, a separate Federal Insurance Court for the adjudication of controversies arising under certain social insurance statutes.[253] While its establishment is not in terms provided for by the constitution, its legality followed from the power of the Diet to legislate on social insurance.

The Federal Court is composed of not less than twenty-six and not more than twenty-eight regular justices, and eleven to thirteen substitutes.[254] Its judicial functions are exercised by nine different divisions.[255] The whole bench acts judicially only in exceptional circumstances—when one division wants to deviate from the decision of another.[256]

4. *Statutory provisions regulating federal jurisdiction*

The federal law on the organization of federal justice also defines in detail the original and appellate jurisdiction of the divisions of the Federal Court in civil, bankruptcy, constitutional, and administrative matters.[257] The criminal jurisdiction

[248] CONST. 1874, Art. 111.

[249] *Id.*, Art. 114.

[250] *Id.*, Art. 64 bis, par. 2. The regulation of the burden of proof and the effects of res judicata are considered as substantive law within the control of the federal legislature; BURCKHARDT, *op. cit. supra*, note 239, at 589*ff*.

[251] *Id.*, Art. 114 bis, par. 1.

[252] Bundesgesetz über die Bundesrechtspflege of 1943, 95 BUNDESBLATT DER SCHWEIZERISHEN EIDGENOSSENCHAFT I, 167*ff* (1943). An official message by the Federal Council which accompanied and explained the bill is published in *id.* at 97.

[253] Federal Ordinance Relating to the Organization and Procedure of the Federal Insurance Court of March 28, 1917, 1 NEUES RECHTSBUCH DER SCHWEIZ, *cited supra*, note 239, at 950.

[254] Law on the Organization of Federal Justice, *supra* note 252, Art. 1.

[255] *Id.*, Art. 12. There are eight ordinary divisions, of which one sits in constitutional and administrative controversies, two in private suits, one in bankruptcy, and four in various criminal matters. An extraordinary division acts on certain criminal appeals from the other divisions. The details are regulated by a General Order of the Court of 1944, 1 NEUES RECHTSBUCH DER SCHWEIZ, cited *supra*, note 239, at 971.

[256] Law on the Organization of Federal Justice, *supra* note 252, Art. 16.

[257] *Id.*, Art. 41*ff*. (civil matters), Art. 75*ff*. (bankruptcy), Art. 83*ff*. (constitutional matters), Art. 97*ff*. (administrative matters).

is governed by separate statutes.[258] It may suffice to point out that an appeal from the final judgments of the cantonal courts in civil suits may be based only upon a violation of federal law or of a treaty.[259] Infringement upon one of the constitutional guaranties cannot be vindicated in that way, but must be asserted in separate proceedings within specially and narrowly defined limits.[260] The decisions of the Federal Court are officially reported and classified according to the four main heads of jurisdiction.[261]

B. The Union of Soviet Socialist Republics

1. *General features of the Constitutional system*

With the disintegration of the Russian Empire in war and revolution in 1917 and 1918, the major ethnic groups established their independence and declared themselves republics. Russians, Ukranians, Byelorussians, Georgians, Armenians, and Azerbaidjanians created soviet socialist republics. Finns, Poles, Estonians, Latvians, and Lithuanians adopted patterns of governmental organization and economic structure familiar to Central and Western Europe. The nomadic feudal peoples of Central Asia emerged in a middle position by establishing soviet republics without public ownership of the means of production.

Survival as individual republics in the face of economic stagnation and the danger of annihilation was found difficult, if not impossible, and a movement toward union emerged as early as 1919.[262] By degrees the peoples of the soviet socialist republics brought their economic, military, and diplomatic activities together until formal union was agreed upon in December, 1922.[263] Union took the form of federation.[264] Since that time internal boundary changes and the admission of

[258] Bundesgesetz über die Bundesstrafrechtspflege of 1934, as amended by the Bundesgesetz über die Organisation der Bundesrechtspflege, Art. 168. 1 NEUES RECHTSBUCH DER SCHWEIZ, cited *supra* note 239, at 906; Schweizerisches Strafgesetzbuch, 1937, Art. 340*ff*., 1 *id*. at 782, 837.

[259] Law on the Organization of Federal Justice, 1943, *supra* note 252, Art. 43. "Federal law" also includes the principles deduced from a federal statute.

[260] *Id*., Art. 43, par. 1, cl. 2. See note 247 *supra*.

[261] Entscheidungen des Schweizerischen Bundesgerichts, issued in four parts, viz., public and administrative law, private law, bankruptcy and criminal law.

[262] Documents relating to Soviet constitutional history have been published in ISTORIYA KONSTITUTSII V DEKRETAKH I POSTANOVLENIYAKH SOVETSKOGO PRAVITELSTVA, 1917-1936 (Moscow, 1936).

[263] The original members of the Union were the Russian Socialist Federated Soviet Republic, the Ukrainian Soviet Socialist Republic, the Byelorussian Soviet Socialist Republic and the Transcaucasian Socialist Federated Soviet Republic. The R. S. F. S. R. was a federation of the Great Russians with the politically and sometimes culturally immature ethnic minorities, living in relatively homogeneous groups, in the area between Leningrad and Vladivostok. No special position was given these minorities in the central governmental structure of the R. S. F. S. R., and their agencies of local government bore the same structural relationship to the central government of the R. S. F. S. R. as the agencies of local government in the provinces which were basically Great Russian in ethnic structure. The Transcaucasian S. F. S. R. differed in that it was a federation of three politically and culturally equal peoples—the Georgians, Armenians and Azerbaidjanians. Each retained its own Republic and delegated to the federal government of the Transcaucasian S. F. S. R. only military and economic powers.

[264] The first federal constitution of the Union of Soviet Socialist Republics was patterned on the Agreement of Union of December, 1922. It was formally and finally adopted on January 31, 1924, although it had been put into effect on July 6, 1923, subject to final approval. For English translation of text, see RAPPARD *et al*., SOURCE BOOK ON EUROPEAN GOVERNMENTS (1937).

additional peoples have swelled the total of federated republics to sixteen.[265] In addition to these "union republics" there are sixteen "autonomous soviet socialist republics," nine "autonomous regions," and ten "national districts."[266]

2. *Constitutional provisions as to the judicial power*

The federating republics brought into the union in 1922 their own systems of courts. These republic courts have remained to the present day the major judicial agencies within the U. S. S. R. The first federal constitution granted to the federal government power to establish the basic principles to be followed by the republics in the structure of their courts and also in the enactment of legislation relating to procedure and to civil, criminal, and labor law; but the enactment of statutes putting these basic principles into effect remained the province of each republic.[267]

A Supreme Court of the U. S. S. R. was also created "for the purpose of enforcing revolutionary law and order within the territory of the U. S. S. R."[268] No inferior federal courts were created by the constitution, but by the first federal judiciary act of 1924[269] military tribunals were created in districts, corps, fronts, and fleets, and the Military Transport College of the Supreme Court was given original jurisdiction over crimes committed by transport officials without regard to the republics in which the crimes were committed.

The judicial system of the U. S. S. R. has continued to be a dual one of federal and republic courts since the establishment of the union. It is currently established in accordance with the pattern authorized by the second federal constitution as follows:[270]

> In the U. S. S. R. justice is administered by the Supreme Court of the U. S. S. R., the Supreme Courts of the Union Republics, the Territorial and Provincial courts, the courts

[265] The second constitution of the U. S. S. R. became effective on December 5, 1936, with eleven participating Republics, namely R. S. F. S. R., Ukrainian S. S. R., Byelorussian S. S. R., Azerbaidjan S. S. R., Georgian S. S. R., Armenian S. S. R., Turkmen S. S. R., Uzbek S. S. R., Tadjik S. S. R., Kazakh S. S. R., and Kirgiz S. S. R. Republics becoming a part of the Union since 1936, with their dates of admission, are the following: Karelo-Finnish S. S. R. (Mar. 31, 1940), Moldavian S. S. R. (Aug. 2, 1940), Lithuanian S. S. R. (Aug. 3, 1940), Latvian S. S. R. (Aug. 5, 1940), and Estonian S. S. R. (Aug. 6, 1940). For text of Constitution of 1936, with amendments, see KONSTITUTSIYA (OSNOVNOI ZAKON) SOYUZA SOVETSKIKH SOTSIALISTICHESKIKH RESPUBLIK (Moscow, 1947), and English translation published by American Russian Institute (New York, 1947).

[266] The governmental agencies of these lesser republics, regions or districts correspond structurally but not in name to provincial or district agencies in the union republics. The principal claim to special constitutional status for these ethnic minorities lies in the fact that within each the language of the ethnic minority is the official language of state agencies and they are represented directly in the Soviet of Nationalities of the U. S. S. R., which is one of the two equally empowered chambers of the Supreme Soviet of the U. S. S. R. in which all federal power resides.

By Art. 35 of the Constitution, the rate of representation is twenty-five deputies from each union republic, eleven deputies from each autonomous republic, five deputies from each autonomous region and one deputy from each national district.

[267] C. I, Art. 1(o) and (p). The 1936 Constitution in Art. 14(u) changed the power of the federal government to authorize it to enact "legislation on the judicial system and judicial procedure: criminal and civil codes." The intervention of the war prevented the development of federal codes, but they are currently in process of preparation.

[268] C. VII, Art. 43.

[269] *Sobr. Zak. S. S. S. R.*, 1924, No. 23, Art. 203.

[270] Art. 102.

of the Autonomous Republics and the Autonomous Regions, the Area Courts, the special courts of the U. S. S. R., established by decision of the Supreme Soviet of the U. S. S. R., and the People's Courts.

Supremacy of the Supreme Court of the U. S. S. R. is established by the Constitution as follows:[271]

The Supreme Court of the U. S. S. R. is the highest judicial organ. The Supreme Court of the U. S. S. R. is charged with the supervision of the judicial activities of all the judicial organs of the U. S. S. R. and of the Union Republics.

3. *Statutory provisions as to the organization of the federal courts*

Details of organization of the Soviet court system are provided in the Judiciary Act of 1938.[272] At the top of the federal court system is the Supreme Court of the U. S. S. R. It is composed of a president and sixty-eight judges named by the Supreme Soviet of the U. S. S. R. for five-year terms.[273] The judges are assigned to five "colleges," dealing with military, railroad transport, and water transport cases, and also criminal and civil cases. To provide a board of review over the work of the "colleges," the sixty-eight judges meet with the president not less often than once every two months as a plenum.

Inferior federal courts exist to hear cases of military, railroad transport, and water transport crimes. The military tribunals are composed of three officers in the military jurists' department of the Red Army. They sit in districts defined by armies, fronts, or fleets and have four grades: (1) division, (2) corps, (3) army or flotilla, and (4) military district, front or fleet. Railroad and water transport courts sit in districts defined by individual railroad systems or river basins, and have two levels.

Non-judicial agencies of the federal government performing functions as law-enforcing agencies are the state arbitration tribunals.[274] These tribunals are organized at three levels, two of which are in the republics. The top level is in the federal government. All have jurisdiction only over cases in which government corporations are the two parties.

4. *Statutory provisions regulating federal jurisdiction*

Original jurisdiction of the federal courts is determined largely by the subject matter of the case. The citizenship or status of the parties is not a determining factor, except in the state arbitration tribunals. In these specialized commercial tribunals one of the bases for federal jurisdiction is that each of the parties, which are always government corporations, has its place of business in a different one of the sixteen union republics. Even in such instances the dispute must involve 50,000 rubles or more, or the tribunal in one of the republics concerned will have jurisdiction.[275]

[271] Art. 104.

[272] *Vedomosti Verkhovnogo Soveta S. S. S. R.*, No. 11, Sept. 5, 1938, reprinted in Code of Criminal Procedure 220 (1947 ed.).

[273] For the present membership see Law of Mar. 19, 1946, *Vedomosti Verkhovnogo Soveta S. S. S. R.*, No. 10 (419), Mar. 28, 1946.

[274] See law of May 3, 1931, *Sobr. Zak. S. S. S. R.*, 1931, No. 26, Art. 203.

[275] *Sobr. Post. S. S. S. R.*, 1938, No. 8, Art. 52.

Federal matters are those of a specialized character having no relation to boundaries of republics. Military tribunals of all grades have jurisdiction depending on the military rank of the person to be tried, the highest grade having the right to review petitions from sentences of the lower tribunals. Jurisdiction in military tribunals is not limited to military personnel, but extends even in peacetime to all civilians who commit acts of treason, espionage, terror, arson, explosion, or other types of diversion.[276] During the past war, jurisdiction was broadened in theaters of war to all crime, and civilians were tried by specially constituted military tribunals of the Ministry of the Interior rather than of the Red Army.[277] Military tribunals have no civil jurisdiction.

The railroad and water transport courts have jurisdiction over criminal acts directed to the disorganization of labor discipline and other crimes upsetting the normal work of transportation, whether the accused be an employee of the transport system or an ordinary citizen.

Jurisdiction of the Supreme Court of the U. S. S. R. is original and appellate.[278] The court may assume original jurisdiction over any case selected by the president of the court because of its national importance. It also hears cassational appeals from the inferior federal courts. While there is no right of appeal from a court of a republic unless the supreme court of a republic has heard a case as a court of original jurisdiction, the Supreme Court of the U. S. S. R. is also active in reviewing cases coming from the courts of the republics. Its attention is drawn by protests of the Prosecutor General of the U. S. S. R. or the president of the Supreme Court itself to the effect that the inferior court has violated substantive or procedural law, whether it be law of the federal government or of the republic concerned.

In making determinations in accordance with its duty to assure observance of the law, the Supreme Court may find that the law which has been violated is that of the Constitution of the U. S. S. R. In such an event the Supreme Court is not empowered to declare the law of a republic unconstitutional, but it notifies the Supreme Soviet of the U. S. S. R., as the repository of all federal power.[279] The Supreme Soviet may then advise the republic to bring its law into conformity with the law of the U. S. S. R. The republic must do so if it desires to remain in the union.[280] No law promulgated by the Supreme Soviet of the U. S. S. R. may be found unconstitutional by the Supreme Court. The Supreme Soviet is its own judge

[276] Law of July 10, 1934, §2. *Sobr. Zak. S. S. S. R.*, 1934, No. 36, Art. 284.

[277] See Order of People's Commissariat of Justice of the U. S. S. R. and of the Prosecutor of the U. S. S. R., June 24, 1941, No. 102/58, §1(b), reprinted in Code of Criminal Procedure, R. S. F. S. R. 123-4. (1943 ed.).

[278] See Judiciary Act of 1938, *supra* note 272, c. VII.

[279] By Art. 43 of the first federal constitution of the U. S. S. R. the Supreme Court of the U. S. S. R. was authorized "to render an opinion on the constitutionality of any decree of a Union Republic if requested to do so by the Central Executive Committee of the U. S. S. R." This provision was not repeated in the second Constitution of the U. S. S. R., but Soviet law professors have said, in conversation, that nothing prevents the Supreme Soviet from asking advice of the Court, although nothing binds the Supreme Soviet to accept the advice when given.

[280] By Art. 17 of the constitution a union republic may secede from the U. S. S. R.

as to when a projected law amounts to an amendment to the constitution, requiring promulgation in conformity with the procedure for amending the constitution.[281]

CONCLUSION

The foregoing survey of the courts in foreign federal systems seems to lead to the following conclusions:

1. Federal systems, with their inherently complicated legalism, seem to spawn difficult jurisdictional questions as a matter of course and therefore to call for the establishment of a separate judiciary or at least specialized courts. While specialized judicial branches have been established even in unitarian governments,[282] the existence of separate judges for the administration of all or portions of the federal law is a general phenomenon in federations.[283] The scope of the business of the federal courts will depend at least in part upon the ambit of federal powers granted by the constitution and upon the limits within which the enforcement of federal statutes can constitutionally be conferred or imposed upon the state courts.[284] The absence of lower federal courts in Switzerland is somewhat deceptive. The different approach to the "rule of law" permits on the lower level the attribution of a non-judicial character to administrative litigation, which becomes judicialized only by complaint to the federal court.

2. The experience of the other federal systems seems to indicate that ordinary diversity jurisdiction tends to become outmoded and superfluous. There is no reason why the dangers against which this type of jurisdiction is intended to guard cannot be effectively suppressed by a proper handling of the Fourteenth Amendment, which of course did not exist when the diversity clause was devised. Interpleader jurisdiction, which does perform a valid function, could now be much more effectively based on the interstate commerce clause.[285] The hope that diversity jurisdiction might tend toward a uniform application of the law has been dispelled by the Supreme Court. It should be realized, however, that such uniformity is really inconsistent with the basic idea of federalism and that its absence in certain fields is the price and effect of local autonomy.

[281] Art. 146.

[282] See, for instance, the French administrative and labor tribunals discussed by Riesenfeld, *The French System of Administrative Justice*, 18 B. U. L. REV. 48*ff*., 400*ff*., 715*ff*. (1938), and Riesenfeld, *Recent Developments of French Labor Law*, 23 MINN. L. REV. 407 (1939).

[283] In the United States the "federal specialties," in spite of their ever-expanding scope, have been generally entrusted to the jurisdiction of a common system of federal tribunals. See Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499, 515 (1928). The creation of specialized federal tribunals such as the Emergency Court of Appeals under the Emergency Price Control Act of 1942 has been the exception.

[284] In the United States Congress apparently can impose the administration of federal statutes upon the state courts to an extent which is very far-reaching and as yet not clearly circumscribed. *See* Testa v. Katt, 67 Sup. Ct. 810 (U. S. 1947), and Hatton, *State Court Jurisdiction of Federal Rights of Action*, 40 ILL. L. REV. 355 (1945).

[285] See the suggestion to this effect in 30 MINN. L. REV. 643, 645 (1946).

3. Experience of other nations, particularly Mexico, shows that the federal due process clause is an important regulator of the centralization and character of justice on the higher level. Constitutionalization of rules of private law, conflicts, or practice may make for uniform application, but it also produces the danger of overburdening the Supreme Court. Constitutionalization of administrative activities is even more dangerous, for it enmeshes the court in problems of political or technical expediency and threatens to impair the standards of judicial performance.

FEDERAL CRIMINAL JURISDICTION AND PROSECUTORS' DISCRETION

L. B. SCHWARTZ*

National criminal jurisdiction, which now ranges from treason to hunting offenses, occupying approximately one quarter of the federal judges' time,[1] had its meager beginnings before the birth of constitutional federal government itself. The Articles of Confederation provided that "the United States in Congress assembled, shall have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas. . . ."[2] The Constitution defined treason and expressly authorized Congress to punish the counterfeiting of United States securities and coins, as well as piracies and felonies on the high seas and offenses against the law of nations.[3] But the great bulk of federal criminal activity rests upon the constitutional power of Congress to enact laws "necessary and proper" to the execution of specifically conferred powers, for there are no common-law crimes in federal jurisprudence.[4] The first federal criminal legislation, antedating

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[1] This estimate is based upon discussion with the Administrative Office of the United States Courts and several judges, district attorneys, and clerks. Available statistics compare only the numbers of civil and criminal cases, *e.g.*, in 1941, a fairly typical year between prohibition and price control, 29,090 criminal cases and 28,909 civil cases were instituted in the eighty-four district courts. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1947), Tables 3 and 10, pp. 92 and 113. For comparison of civil and criminal case activity in recent years, see Charts 1 and 5 of the same REPORT, following pp. 29 and 35.

The range of federal criminal enforcement is indicated in the classification, by offense, of the 31,114 cases instituted in 1947. The most active categories were:

Fraud and other theft	7082
Immigration	7029
National Motor Vehicle Theft Act	3244
Liquor (internal revenue)	3078
Narcotics	1726
Price control	1454
Juvenile delinquency	1261
Selective service	1186
Migratory bird offenses	621

Other high-frequency categories included Motor Carrier Act violations, interstate transportation of women for immoral purposes, stowaway offenses, impersonation of federal officials, labor standards offenses, robbery and firearms offenses. *Id.*, Table D-2.

The A. L. I. study of THE BUSINESS OF THE FEDERAL COURTS (1934) shows a gradual increase in criminal cases from about 5,000 in 1875 to about 15,000 a year from 1898 to 1917, after which the curve moves upwards once more to the prohibition peak of over 90,000 in 1932. See Chart, p. 31, and Table, p. 107.

[2] Articles of Confederation (1777) Art. IX, U. S. Code (1940) p. XXV.

[3] Art. I, §8, Art. III, §3.

[4] U. S. v. Worrall, 2 Dall. 384, 28 Fed. Cas. 774, No. 16,766 (C. C. Pa. 1798); U. S. v. Hudson, 7 Cranch 32 (U. S. 1812); U. S. v. Coolidge, 1 Wheat. 415 (U. S. 1816).

even the creation of federal courts, punished revenue frauds.[5] Direct interferences with federal justice (*e.g.*, perjury in a federal court, bribery of a federal judge) were dealt with in the Act of April 30, 1790, "for the Punishment of Certain Crimes against the United States."[6] By 1825, federal law extended to arson of a federal vessel (but only if "out of the jurisdiction of any particular State"), extortion by a federal officer, and theft by an employee from the Bank of the United States.[7] Not until after the Civil War did the federal criminal law make its first substantial ventures beyond the punishment of acts directly injurious to the central government.

With two pieces of reconstruction legislation, the nation was launched upon the course of employing federal sanctions to protect private individuals from invasion of their rights by other private individuals—a traditional function of state law. In the Civil Rights legislation[8] individuals were protected, under certain circumstances creating federal jurisdiction, against assault, murder, and threats. The Post Office Code of 1872 afforded the protection of federal criminal law against moral corruption and financial depredation, upon a showing that postal facilities had been used to promote fraud or lotteries, or to disseminate obscenity.[9] It was during this period also that Congress provided for the removal to the federal courts of state proceedings, civil or criminal, "against any person who is denied or cannot enforce in the judicial tribunals of the State" his equal civil rights as a citizen of the United States,[10] as previously it had provided for removal of state prosecutions for acts done in the capacity of a federal revenue officer.[11] The states had shown an inability or unwillingness to protect the interests committed to their protection by the Constitution; now constitutional means had been forged or found to permit a more powerful protector to act. Nothing new in principle is added when it becomes criminal in 1910 to transport a woman in interstate or foreign commerce for immoral purposes,[12] and in 1919 to transport a stolen motor vehicle in interstate commerce.[13] National prohibition perhaps marks the zenith of this movement; but even as it was laid to rest Congress pushed on with new penal laws in the 1930's directed at kidnaping, extortion, use of firearms, and many forms of theft,[14] creating when necessary extraordinary presumptions to support federal jurisdiction, *e.g.*, that the victim of a kidnaping has been transported in interstate commerce if he has not been released within seven days,[15] and that a firearm was received in interstate commerce after

[5] 1 STAT. 29, 46 (1789).

[6] 1 STAT. 112 (1790). This act also contained a general penal code for federal territories, within which Congress exercises a complete sovereign rather than a limited federal legislative jurisdiction.

[7] 4 STAT. 115, 117-118 (1825).

[8] 14 STAT. 27 (1866); 16 STAT. 140, 144 (1870); see 18 U. S. C. §§51 and 52 (1940).

[9] 17 STAT. 283, 302, 323; see 18 U. S. C. §§334, 336, 338 (1940).

[10] 12 STAT. 756 (1863); see 28 U. S. C. §74 (1940).

[11] 4 STAT. 633 (1833); see 28 U. S. C. §76 (1940).

[12] 36 STAT. 825 (1910), 18 U. S. C. §398 (1940).

[13] 41 STAT. 324 (1919), 18 U. S. C. §408 (1940).

[14] See symposium on the criminal legislation of the Seventy-third Congress, 1 LAW & CONTEMP. PROB. 399 *et seq.* (1934); Conboy, *Federal Criminal Law*, in LAW: A CENTURY OF PROGRESS 295 (1937).

[15] 48 STAT. 781 (1934), 18 U. S. C. §408a (1940).

the effective date of the Federal Firearms Act, if found in the possession of a defendant previously convicted of a crime of violence.[16]

The gradual assumption of the power to punish for ordinary crimes proceeded concurrently with a great expansion of the role of the central government in many public-welfare fields. Interstate transportation, communication, and power distribution, the wholesomeness and proper labeling of food, the marketing of grain and securities, wages and hours of labor, the hunting of migratory game, and in wartime the price and distribution of nearly all commodities, were subjected to federal regulation. Nearly always the requirements of these regulatory measures were backed by criminal sanctions.

Thus federal criminal jurisdiction is being employed in three different ways: (1) to punish anti-social conduct of distinctively, if not exclusively, federal concern; (2) to punish conduct of local concern, with which local enforcement authorities are unable or unwilling to cope; and (3) to secure compliance with federal administrative regulations.[17] It will be apparent in the ensuing discussion that these categories are not mutually exclusive; the most that can be said is that a particular federal criminal statute falls largely or primarily under one rather than another of these headings. It is the thesis of this article that federal criminal jurisdiction is an institution well adapted to the first use mentioned above, that it has been employed indiscriminately in the second category, and that a new federal court of inferior jurisdiction is needed to handle the considerable volume of petty offenses in category three. It will be urged that the proper employment of the federal court in the criminal field requires the recognition and practice of a much broader discretion by United States attorneys to turn over to state authorities persons who, by the same conduct, violate local laws as well as national laws intended to be auxiliary to local enforcement.

I

FEDERAL "SELF-DEFENSIVE" CRIMINAL JURISDICTION

There would be small profit in debating at this point in our history the question, "Shall we abolish federal criminal jurisdiction?" The institution's permanence is assured not only by the inertia of long tradition, but also by notable recent successes against traitors, kidnapers, racketeers, communists, and others against whom public indignation is easily aroused. We may, however, explore with profit the extent to which federal prosecutors should invoke federal criminal jurisdiction, for, with the present arsenal of federal criminal statutes, the discretion of the Department of Justice is replacing the command of Congress in determining the working line between federal and state enforcement activities. The United States district

[16] 52 STAT. 1250 (1938), 15 U. S. C. §902(f) (1940). This presumption was invalidated in Tot v. United States, 319 U. S. 463 (1943).

[17] *Cf.* a somewhat similar classification in ARTHUR C. MILLSPAUGH, CRIME CONTROL BY THE NATIONAL GOVERNMENT 291 (Brookings Inst., 1937).

attorney can generally find some federal hold on a situation. What are the considerations which lead him to act or to withhold his hand?

Given the federal criminal court, the strongest case for the exercise of its power can be made in the category of offenses which undermine the court itself or the governmental authority which the court represents. Thus few would question the propriety of federal punishment of treason, espionage, contempt of court, bribery of federal officials, resistance or obstruction to federal process, interference with recruiting, or defrauding the revenue. This is the oldest and best established branch of federal criminal jurisdiction. Important values in terms of prestige of the central authority are involved. The pomp and power of a court are potent symbols behind which to rally the allegiance of masses of people who might otherwise have difficulty envisioning a more remote and intangible sovereign. ". . . to surround the Constitution with more ramparts and to disconcert the schemes of its enemies," wrote Hamilton, urging extension of the federal judiciary, "the proper measures to be adopted [are] . . . First, establishments which will extend the influence and promote the popularity of the government. . . ."[18] A powerful federal court would bring federal authority and law "closer to the feelings, understanding and affection of all citizens."[19] The extent to which the prestige of the federal system continues to rest upon the institution of the federal court in this day may be doubted. The armed forces, the income-tax collector, the post office, social security, and federal highways bring home to Everyman the strength and permanence of the central government. Perhaps present-day federal courts derive their prestige from the government rather than create it for the parent organization. But whether as an attribute of the court or of the government, this symbolic value of a federal criminal tribunal is clearly at its maximum in what might be called the self-defensive prosecutions by the federal government.

Moreover, in relation to such prosecutions there are valid administrative considerations which favor a separate federal tribunal. If genuinely national interests are at stake, the controversies should not have to compete with local breaches of the peace crowding the calendar of a county court of quarter sessions. The judge who determines these controversies should be able to give them the time and consideration appropriate to matters of such gravity. He should be a specialist in devising solutions that grow out of an understanding of national objectives and a national point of view. The exigencies of the Department of Justice are also to be considered. It is easier to prepare cases for eighty-four district courts, now operating under uniform rules of criminal procedure, than to conduct proceedings in thousands of courts operating under scores of procedural codes.

The possibility of conflict between local and national interests must also be

[18] 10 HAMILTON (Lodge ed.) 329, quoted in Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 558, n. 36 (1925).

[19] Warren, *supra* note 18, at 561, quoting the *Washington Federalist* in the debate over the Judiciary Act of 1801.

envisioned, and provision must be made for resolving such conflicts by representatives of national authority if national law is to remain paramount. Possible local nullification of federal law was one of the Federalists' arguments for a strong national judiciary:

> The most discerning could not foresee how far the prevalency of a local spirit might be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover, that courts constituted like those of some of the States would be improper channels of the judicial authority of the Union. State Judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.[20]

It is an argument which Congress has accepted as ground for broadening federal criminal jurisdiction at each of the recurrent states'-rights crises in our history. It may seem paradoxical that trial in a federal court should be effective to counter local resistance against federal law. Federal judge, jury, and prosecutor come from the same area and social groups from which the state court draws its personnel. Yet the very fact of employment by the central government seems to shift the center of loyalty and to modify or restrain local attitudes. There is a kind of esprit de corps uniting men to the organization to which, if only for the time being, they belong, that causes a juryman to react differently in the federal court than he would in his county courthouse across the street.[21]

Despite the considerations of national prestige, administrative convenience, and possible local obstruction, which justify reserving in the central government a power to act against anti-federal conduct, it does not follow that all conduct which adversely affects the federal organization must be dealt with in the federal courts. Early Congresses frequently relied on state courts to enforce penalties under federal revenue laws, and the doctrine that it is "inherently impossible" for the courts of one sovereign to enforce the penal laws of another as applied to the relations between Federal and state governments has been exploded by the removal cases.[22] Theft of federal property is a federal offense, but it is also punishable by the states.[23] Clearly federal prosecution would be in order against a conspiracy, perhaps with the con-

[20] 9 HAMILTON (Lodge ed.) 506, quoted in 1 E. N. ZOLINE, FEDERAL CRIMINAL LAW & PROCEDURE (1921), Introd. p. x.

[21] See Mr. Justice Roberts' dissenting opinion in Screws v. United States, 325 U. S. 91, 158-159 (1945): "The Government further urges that, since prosecutions must be brought in the district where the crime was committed, the judge and jurors of that locality can be depended upon to protect against federal interference with State law enforcement. . . . If federal and State prosecutions are subject to the same influences, it is difficult to see what need there is for taking the prosecution out of the hands of the State. After all, Georgia citizens sitting as a federal grand jury indicted and other Georgia citizens sitting as a federal trial jury convicted Screws and his associates; and it was a Georgia judge who charged more strongly against them than this Court thinks he should have." *Cf.* evidence of the fairness of state court decisions on federal questions. Warren, *supra* note 18, at 569, 584 *et seq.*; Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 492 *et seq.* (1928).

[22] Tennessee v. Davis, 100 U. S. 257 (1879); see Warren, *supra* note 18, at 576 *et seq.*

[23] State v. Stevens, 60 Mont. 390, 405, 199 Pac. 256 (1921); State v. Frach, 162 Ore. 602, 94 P. 2d 143 (1939).

nivance of federal officials, to steal federally owned war surplus commodities held in warehouses throughout the country. Public confidence in the integrity of the distribution processes of the War Assets Administration is challenged. The Attorney General's purpose to vindicate federal authority would be hampered by any necessity to pursue the offenders through a number of local larceny prosecutions, and the deterrent effect would be considerably weakened. The federal property crimes, howver, reach far beyond such cases. Knowledge that the property belongs to the United States is not required,[24] and one can imagine extreme applications of federal jurisdiction: a burglar ransacking the suburban home of a federal official takes a brief case belonging to the government; a pickpocket snatches a wallet containing OPA gasoline ration coupons.[25] The dearth of such cases in the federal reports would indicate some common-sense self-restraint by federal prosecutors in invoking the sweeping power of federal theft legislation.

A situation intermediate between that of theft directed against the United States and theft which fortuitously involves United States property is presented by the stealing of mail matter.[26] Here the principal victim is the owner of the article stolen, not the United States, although the Government has an interest as bailee sufficient to support an indictment for stealing federal property.[27] The amount may be petty and the activity completely local. No regional obstruction of national policy is to be anticipated, and federal prestige is hardly staked on the conviction of a mail pilferer. Our standards may nevertheless imply the desirability of federal prosecution if small thefts are so numerous as to place a substantial operating burden on the postal system in tracing lost articles, or as to require expensive preventive measures. To protect the carrying out of this federal function may require coordinated enforcement efforts during which the cases should be singled out from other petty marauding for treatment in the tribunal of national concern. The penalty may be gauged by the special standard of reference to the needs of the federal system rather than by the value of the stolen property.

Another illustration of federal offenses which combine aspects of "self-defense" of the federal organization or function with the possibility of application to conduct containing very little of federal significance is impersonation of federal officials.[28]

[24] The point seems rarely if ever to have been raised. See United States v. Kambeitz, 256 Fed. 247, 255 (N. D. N. Y. 1919), *aff'd*, 262 Fed. 378 (C. C. A. 2d 1919) (defendant stole furs and dresses from a railroad express shipment while railroads were being operated by the United States); Thompson v. United States, 256 Fed. 616 (C. C. A. 2d 1919) (defendant stole fifteen sacks of sugar from a river barge; United States ownership established by testimony of refiner's manager identifying this sugar from company records and code marks on the sacks as having been allocated to meet a requisition by the United States); Norris v. United States, 152 F. 2d 808 (C. C. A. 5th 1946) (federal game warden robbed of auto belonging to United States). Note in each of these cases the element of interference with some governmental function in addition to mere proprietorship.

[25] Under the regulations such coupons remained the property of the Office of Price Administration even after issuance. See Davis v. United States, 328 U. S. 582, 588 (1946).

[26] 35 STAT. 1125 (1909), as amended, 18 U. S. C. §317 (1940).

[27] United States v. Kambeitz, *supra* note 24.

[28] Sec. 32 of the Criminal Code, 52 STAT. 83 (1938), 18 U. S. C. §76 (1940).

A multiplication of cases of false assumption of federal authority may lead to a skepticism regarding credentials of genuine federal officers and may impede them in the exercise of their duties. Activities of impostors may also breed disrespect for federal authority. A power to prevent such consequences must be lodged in the federal authority, for reasons analogous to those applicable to postal depredation.[29] The impersonation statute, however, is dratfed in terms as appropriate to private cheat as national menace. It permits a prosecution like *Little v. United States*,[30] where the defendant, responding to a matrimonial advertisement by a widowed rooming-house keeper, bilked her of $30 lodging, $7 spending money, and a $600 loan on the representation, among others, that he was a United States Secret Service operative. A discreet prosecution policy in the light of the special function of the federal forum would have drawn the line well short of this case.

II

FEDERAL CRIMINAL JURISDICTION AUXILIARY TO STATE ENFORCEMENT

There is even more reason for restraint in creating and exercising federal criminal jurisdiction auxiliary to state law enforcement. To enlist the federal power in the battle against obscenity, lotteries, theft, alcoholism, and prostitution is not to protect federal prestige but to hazard it; it does not solve federal administrative problems but creates new ones; it does not vindicate federal authority in matters of distinctively national concern against possible local obstruction, but steps into local issues. Federal intervention also has a tendency to weaken the enforcement efforts of state authorities.[31] If, nevertheless, national intervention is necessary, such intervention should proceed with an understanding of the disadvantages of dual state and federal criminal systems, disadvantages which are at their maximum when the federal law is employed to supplement local enforcement. The intervention, moreover, will be haphazard and arbitrary until there is full comprehension of the *auxiliary* role of the federal government; *i.e.*, until we cease to regard the jurisdictional circumstance, which gives the United States power to act, as the "gist" of the federal offense.

A. Anomalies of Dual Jurisdiction

Were we not inured to the irrationalities which permeate our criminal law generally, the anomalies in its administration resulting from a dual judicial system would long ago have gained notoriety surpassing that of *Swift v. Tyson*.[32] Substantially the same activities may be successively punished by both state and federal governments,[33] although presumably the sentence imposed by each sovereign is

[29] See United States v. Lepowich, 318 U. S. 702 (1943).

[30] 169 Fed. 620 (C. C. A. 9th 1909).

[31] See statement of Attorney General Mitchell, quoted in Hall, *Federal Anti-Theft Legislation*, 1 LAW & CONTEMP. PROB. 424, 432 (1934).

[32] 16 Pet. 1 (U. S. 1842).

[33] Crossley v. California, 168 U. S. 640 (1898) (murder by derailing United States mail train);

deemed by its legislature and courts appropriate to deter, reform, or incapacitate the offender. The dual jurisdiction has resulted in the so-called detainer system. A state prosecuting official, for example, will notify a federal warden that a prisoner is wanted for local prosecution after he has served his federal sentence. This prosecution may be for conduct which the federal judge took into account in imposing sentence, or even the identical conduct which was the subject of federal indictment. Parole authorities refuse to grant parole to prisoners against whom such detainers have been filed. Prisoner morale is undermined by knowledge of this practice and expectation of further imprisonment, with disastrous effect upon any program of reformation. Detainers are sometimes lodged with no real intention of prosecuting but solely to prevent parole.[34]

Only two significant limitations of the double punishment possibilities appear. One is a judicial doctrine restraining the states: they may not punish non-compliance with standards of conduct which conflict with those prescribed by Congress.[35] The other is a legislative restraint on federal action: in connection with a few of the greatest extensions of federal jurisdiction over property offenses it has been provided that

> A judgment of conviction or acquittal on the merits under the laws of any State shall be a bar to prosecution hereunder for the same act or acts.[36]

Absent such provision, acquittal in the courts of one system will not bar prosecution in the tribunals of the other system for the same transaction,[37] although within each system immunity from double jeopardy ranks high among the traditional liberties of Anglo-American justice.

The dual court system and the extension of federal criminal jurisdiction in the "auxiliary" field harbor not only the possibilities of double trials and double punishment, but also problems of inequality of treatment of like offenders. Generally, duplicate prosecutions do not take place, although they are technically possible. A choice between federal and state action is made by the prosecuting authority. The

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Hebert v. Louisiana, 272 U. S. 312 (1926) (illegal possession of alcoholic liquor). *But cf.* Puerto Rico v. Shell Co., 302 U. S. 253, 264 *et seq.* (1937) (duplicate prosecution under territorial law barred since both laws emanate from same sovereign). Concurrent state jurisdiction is expressly provided for by Sec. 326 of the Criminal Code, 35 STAT. 1151 (1909), 18 U. S. C. §547 (1940), which is carried forward in Sec. 3231 of the proposed Revision of the Criminal Code, H. R. 3190, 80th Cong., 1st Sess. (1947): ". . . nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

[34] See criticism of this system by United States District Judge Carroll C. Hincks, Director of the Federal Bureau of Prisons James V. Bennett, and others in *Federal Probation*, reprinted in The New Era, Fall, 1945, p. 20 *et. seq.*

[35] Easton v. Iowa, 188 U. S. 220 (1903) (*rev'g* state conviction of national bank officer for receiving deposits after insolvency); State v. Thornton, 171 Minn. 466 (1927).

[36] Larceny of goods in interstate or foreign commerce, 37 STAT. 670 (1913), as amended, 18 U. S. C. §410 (1940). Train wrecking, 54 STAT. 255, 18 U. S. C. §412a (1940). Theft and embezzlement by officers of interstate and foreign carriers, 38 STAT. 733 (1914), 18 U. S. C. §412 (1940).

[37] United States v. Barnhart, 22 Fed. 285 (C. C. Ore. 1884) (acquittal in state court of a white man for murder of Indian no bar to prosecution in the federal court for killing the Indian on an Indian reservation).

choice will be significant to the defendant procedurally. For example, in the federal court he will have compulsory process to secure the attendance of witnesses from anywhere in the United States.[38] The federal prosecutor, on the other hand, will find it easy to remove a defendant from place of arrest to place of trial under federal Criminal Rule 40,[39] as compared with the state prosecutor's necessity of resorting to interstate rendition. The defendant will find in the federal criminal courts an unusual solicitude to protect him against extra-judicial confessions secured by illegal methods of federal officials.[40] But prosecution in the federal court will make available against him information, illegally obtained by state officers, which for that reason might not have been admissible against him in the state court. The privilege against self-incrimination and the right to be secure against unreasonable searches and seizures, protected within each system against encroachment by agents of that system, lose their efficacy when the invasion comes from one set of officials but is availed of by the other.[41] The Supreme Court of Michigan in a very recent case seems to have been the first to recognize the mockery of this kind of privilege against self-incrimination in an era when criminal conduct is so likely to offend both federal and state law.[42]

More striking than the procedural variations is the effect of the choice of forum on the penalty which may be imposed. It may mean the difference between life and death, as under the federal kidnaping statute which authorizes the death penalty for an offense which in many states is not capital.[43] Fornication, if criminal at all, is rarely punished by the states. Let the defendant transport his mistress across the state boundary and he becomes subject to the five-year penalty of the Mann Act.[44] Similar differences of treatment depending on the choice between federal and state prosecution occur in connection with federal legislation against the mailing of obscene or indecent matter or lottery advertisements. Indeed, these federal offenses may include some activities entirely lawful under state law, as where games of chance or dissemination of information on contraception has been legalized.

It will be objected against the foregoing analysis that procedural variations and inequalities of treatment are the natural consequence of the fact that the defendant's

[38] FED. R. CRIM. P. 17, 18 U. S. C. A. (Supp. 1946), following §687.

[39] *Ibid.*

[40] McNabb v. United States, 318 U. S. 332 (1943).

[41] United States v. Murdock, 284 U. S. 141, 149 (1931). (The opinion refers to the similar British rule which does not protect against compulsory disclosure of offenses violating laws "of another country.") Hale v. Henkel, 201 U. S. 43 (1906); Jack v. Kansas, 199 U. S. 372 (1905).

[42] People v. Den Uyl, 29 N. W. 2d 284 (Mich. 1947).

[43] *Cf.* 50 STAT. 304 (1937), 18 U. S. C. §542 (1940), authorizing the federal court to designate another state for execution "if the laws of the State within which the sentence is imposed make no provision for the infliction of the penalty of death. . . ."

[44] 36 STAT. 825 (1910), 18 U. S. C. §398 (1940). Although this act was passed to enable the Federal Government to reach organized interstate prostitution, its application to isolated or essentially local offenses is possible and not infrequent. Caminetti v. United States, 238 U. S. 636 (1915); United States v. Reginelli, 133 F. 2d 595 (C. C. A. 3d 1943), *cert. denied*, 318 U. S. 783; *cf.* Cleveland v. United States, 329 U. S. 14 (1946); Mortensen v. United States, 322 U. S. 369 (1944).

conduct gave rise to two separate causes of action, whereas the essential evil of the "federal common law" sponsored by *Swift v. Tyson* was that a plaintiff with a single cause of action was given power to choose a favorable forum. Neither the federal nor the state prosecutor has such a choice; each proceeds in his own tribunal for an offense committed against his own sovereign. This view has prevailed in the double-jeopardy cases previously discussed. A more realistic concept might be that federal and state prosecutors are, at least in the area of "auxiliary" federal criminal law, merely alternative instruments evolved by the American community for the purpose of deterring certain types of anti-social conduct or of reforming or incapacitating those who engage in such conduct. The community acts through its state organization where this is feasible, or, if the matter is beyond the effective control of that organization, through its national agencies and institutions. Treatment of the offender ought not to differ depending on the agency employed to administer the treatment. This is not to suggest that penalties under federal law be made to conform to those prescribed for cognate offenses under local codes. The point is only that the difference in treatment of similar conduct depending on whether state or federal government prosecutes is an additional reason for working out procedures under which the states handle as many as possible of the offenses which do not involve a substantial federal interest. Where a true federal concern is involved, the significance of the defendant's transgression is changed, thereby justifying distinctions in penalty from local misconduct, as well as some national uniformity of treatment by the federal courts.

B. Criteria for Limiting Employment of Federal Criminal Laws Auxiliary to State Enforcement

Considering the vices of dual criminal jurisdiction, it is important to develop definite criteria for limiting the number of federal prosecutions under criminal laws which are merely auxiliary to state law enforcement. The Criminal Division of the Department of Justice must work these out in detail for each offense, but in general it can be said that federal action is justified in the presence of one or more of the following circumstances: (1) When the states are unable or unwilling to act; (2) when the jurisdictional feature, *e.g.*, use of the mails, is not merely incidental or accidental to the offense, but an important ingredient of its success; (3) when, although the particular jurisdictional feature is incidental, another substantial federal interest is protected by the assertion of federal power; (4) when the criminal operation extends into a number of states, transcending the local interests of any one; (5) when it would be inefficient administration to refer to state authorities a complicated case investigated and developed on the theory of federal prosecution.[45] The following paragraphs illustrate the varying extent to which these considerations seem to influence federal prosecution policy.

[45] The analysis is drawn in part from a memorandum by Professor Herbert Wechsler of the Columbia University Law School.

Frustration of state law enforcement by the territorial limitations on the authority of its officers is an obvious occasion for federal assistance. The Federal Fugitive Felon Act lays the basis for such assistance by making it unlawful to move across state lines to avoid prosecution by a state for certain relatively serious offenses, or to avoid testifying in state felony proceedings.[46] This law was intended to provide a jurisdictional basis for FBI assistance in apprehending the fugitive (since the Bureau can investigate only federal crimes), and to facilitate removal (at federal expense) of the defendant to the jurisdiction from which he has fled. In view of this it has always been the policy of the Department of Justice to authorize complaints under this act only at the instance of state authorities and to release the defendant to state authorities after removal. Only rarely would federal prosecution be appropriate under this "auxiliary" statute. Yet it has been invoked against a New Jersey doctor who in New Jersey removed identifying scars of a burglar fugitive from North Carolina, on the theory that the doctor was an accessory after the fact to the federal felony of interstate flight.[47] And a fugitive witness, who might have been punishable by the state only for contempt, recently received a four-year sentence under circumstances suggesting that the penalty was related to a crime for which he had been given immunity in the state proceedings.[48]

The mail fraud statute is a more typical case of federal intervention based on several of the criteria mentioned at the head of this section. A promoter in a western mining state mulcts a nation-wide "sucker list" year after year by fraudulent representations as to the amount of "probable" ore in a mine or by cleverly conditional promises of dividends in the near future. His neighbors, more sophisticated in the mores of mining promotion than distant farmers and urbanites, are unlikely to be victimized, and inclined to be tolerant of "representations of opinion" or "promises" when asserted as a basis for criminal liability or extradition. The scattered victims, on the other hand, have little leverage with which to secure action from their home authorities. Individual losses may be small, the expense of extradition heavy, the burden of proof as to likelihood of dividents from a mine thousands of miles away beyond the capacity of the county prosecutor. Here federal prosecution would be appropriate not only because of state inability to deal with the situation, but because the abuse of the mail privilege is an inherent element of the scheme. Such frauds could hardly operate except through this federally supported means of communication. The central government, therefore, assumes a responsi-

[46] 48 STAT. 782 (1934), as amended, 18 U. S. C. §408e (1940). See Toy and Shepherd, *The Problem of Fugitive Felons and Witnesses*, 1 LAW & CONTEMP. PROB. 415 (1934).

[47] United States v. Brandenburg, 144 F. 2d 656 (C. C. A. 3d 1944) (conviction reversed on ground that "burglarly," as used in the Fugitive Felon Act, meant common-law burglarly only. This prosecution can be understood only in the light of Brandenburg's previous successful encounters with the law and his ultimate capitulation in a federal narcotics prosecution in which entrapment was the chief legal issue. United States v. Brandenburg, 162 F. 2d 980 (C. C. A. 3d 1947).

[48] Hemans v. United States, 163 F. 2d 228 (C. C. A. 6th 1947). Perhaps occasional prosecutions are necessary to preserve the fiction that it is indeed the "peace of the United States" that is involved. *Cf.* Pollock, *King's Peace in the Middle Ages*, 13 HARV. L. REV. 177 (1900).

bility that the facilities which it furnishes shall not be abused and that fraud shall not be subsidized by cheap federal means of dissemination. It will be recalled in this connection that punishing the user of the mails evolved as a supplement to the postmaster's administrative duty and discretion not to carry noxious articles. To employ the mail fraud statute here is not only to supplement state action against fraud but to support and protect a federal function.

But the mail fraud statute may also be used where state action is frustrated only by the corruption of state officials, and where use of the mails is an unintended and remote incident of the scheme. Thus *Leche v. United States*[49] and *Hart v. United States*[50] were cases of ordinary local political graft in the sale of property to the State of Louisiana at exorbitant prices, with the connivance of the governor and other officials. Federal jurisdiction rested upon the fact that checks for the proceeds of the frauds were deposited in banks other than those upon which they were drawn. The banks of deposit forwarded the checks for collection from the drawee bank, *by mail*. The fraud was local in its execution and effect; the offenders were within reach of state process, and state law was adequate to the situation. But the defendants' dominance over the state government gave them immunity until the federal government intervened. Nevertheless, there was considerable resentment against this "interference with purely domestic affairs of the State," especially at the suggestion that the mail fraud statute might be used to police the Louisiana state primary election, on the theory that a dishonest election would result in defrauding the state of the salary which it would pay to an improperly chosen official.[51]

It is not surprising that hostility to federal intervention should be strongest when explosive race-relations issues are also involved; witness the savage congressional battles over the proposed anti-lynching legislation and the resistance to the application of the civil rights sections of the Criminal Code to punish official brutality against Negroes, where local prosecutors refuse to act.[52] *Screws v. United States* was such a case.[53] A Georgia county sheriff beat to death a Negro whom he purported to be arresting. The sheriff was convicted under Section 20 of the federal Criminal Code, which makes it a crime under color of state law willfully to deprive any inhabitant of rights, privileges, or immunities secured or protected by the federal Constitution and laws. Four members of the Supreme Court were satisfied that the Act covered the facts, but voted for reversal of the conviction because the trial

[49] 118 F. 2d 246 (C. C. A. 5th 1941), *cert. denied*, 314 U. S. 617, *rehearing denied*, 314 U. S. 712 (1941).

[50] 112 F. 2d 128 (C. C. A. 5th 1940), *cert. denied*, 311 U. S. 684.

[51] *Cf.* United States v. Aczel, 219 Fed. 917 (D. Ind. 1915), *aff'd*, 232 Fed. 652 (C. C. A. 7th 1916). See 86 CONG. REC. 720, 2557 (1940) (Senator Pepper): "I proclaim it as the privilege of a State in a democratic Government even to have bad government, if its people want it to be bad. . . ." See also Johnston, *They Sent a Letter*, The Saturday Evening Post, June 22, 1940, p. 29, col. 1, pointing out that Louisiana grafters, as a result of the Federal Government's imprisonment of Capone on income tax fraud, had reported their unlawful gains thinking thereby to exclude any possibility of federal action.

[52] The civil rights legislation also serves a purpose which may properly be regarded as "self-defensive," *e.g.*, United States v. Classic, 313 U. S. 299 (protection of federal election processes).

[53] 325 U. S. 91 (1945).

judge failed to charge that the defendant must have had the specific purpose to deprive the prisoner of his constitutional right to trial by court rather than by ordeal.[54] Justices Rutledge and Murphy would have affirmed:

> Too often unpopular minorities, such as Negroes, are unable to find effective refuge from the cruelties of bigoted and ruthless authority. States are undoubtedly capable of punishing their officers who commit such outrages. But where, as here, the states are unwilling for some reason to prosecute such crimes the federal government must step in unless constitutional guarantees are to become atrophied.[55]

Mr. Justice Roberts, with Justices Frankfurter and Jackson, thought that:

> The only issue is whether Georgia alone has the power and duty to punish, or whether this patently local crime can be made the basis of a federal prosecution. The practical question is whether the States should be relieved from the responsibility to bring their law officers to book for homicide, by allowing prosecutions in the federal courts for a relatively minor offense carrying a short sentence.[56]

They read the language and legislative history of Section 20 as conclusively against application to a state officer who "flouts State law and is unquestionably subject to punishment by the State for his disobedience."[57]

The arguments in the *Screws* case evoked one of the infrequent official disclosures of the role of prosecutor's discretion in the distribution of criminal business between federal and state courts. The brief of the United States sought to minimize the danger of federal displacement of state authority by demonstrating the Department of Justice's self-restraint:

> The Department of Justice has established a policy of strict self-limitation with regard to prosecutions under the civil rights acts. When violations of such statutes are reported, the Department requires that efforts be made to encourage state officials to take appropriate action under state law. To assure consistent observance of this policy in the enforcement of the civil rights statutes, all United States Attorneys have been instructed to submit cases to the Department for approval before prosecutions or investigations are instituted. The number of prosecutions which have been brought under the civil rights statutes is small. . . . Since 1939, the number of complaints received annually by the Civil Rights section has ranged from 8,000 to 14,000, but in no year have prosecutions under both Sections 20 and 19, its companion statute, exceeded 76. . . .
>
> Complaints of violations are often submitted to the Department by local law enforcement officials who for one reason or another may feel themselves powerless to take action under state law. It is primarily in this area, namely, where the official position of the wrong doers has apparently rendered the State unable or unwilling to institute proceedings, that the statute has come into operation.[58]

[54] *Id.* at 107.

[55] *Id.* at 138.

[56] *Id.* at 139. *Cf.* Crews v. United States, 160 F. 2d 746, 747 (C. C. A. 5th 1947), affirming conviction on a similar set of facts: "The defendant, although guilty of a cruel and inexcusable homicide, was indicted and convicted merely of having deprived his helpless victim of a constitutional right, under strained constructions of an inadequate Federal statute, and given the maximum sentence under that statute of one year in prison and a fine of $1,000."

[57] Screws v. United States, 325 U. S. 91, 142 (1945).

[58] *Id.* at 159-160.

To this Mr. Justice Roberts replied:

> If it be significantly true that crimes against local law cannot be locally prosecuted, it is an ominous sign indeed. In any event, the cure is a reinvigoration of State responsibility. It is not an undue incursion of remote federal authority into local duties with consequent debilitation of local responsibility. . . .
>
> Regard for this wisdom in federal-State relations was not left by Congress to executive discretion.[59]

The role of discretion in the distribution of law enforcement responsibility between state and federal governments is therefore emerging as an important judicial as well as political issue. The *Screws* case serves notice upon Congress and the Attorney General to develop, perfect, and properly circumscribe this essential discretion. Congress must make it plain beyond question that it does rely upon the Attorney General's self-restraint, when it passes criminal laws that supplement state efforts. The Attorney General can do much to allay the suspicion which inevitably clouds areas of large executive discretion, by articulating in a public and formal fashion the criteria which guide him in exercising this discretion, not only in civil rights cases but in all offenses against auxiliary federal criminal laws. A beginning, but only a beginning, has been made in the standing Instructions to United States Attorneys, which circulate only within the Department.

C. Inadequate Statutory Formulation of Federal Auxiliary Criminal Jurisdiction

Up to this point emphasis has been placed upon the fact that definition of federal crime in terms of the circumstance which confers federal jurisdiction often brings into the national courts matters which might be left to the states. It is also true, however, that Congress has not fully exploited its constitutional powers to deal with crime, either to protect federal interests or to supplement state forces. Preoccupied with the jurisdictional problem, it has legislated against "use of the mails," or "transportation in interstate commerce," rather than against fraud or theft wherever they occur within reach of the federal power. This results in some surprising lacunae in the federal hold on crime. The central government will move against fraudulent schemes if the defendant "for the purpose of executing such scheme" uses the mails in minutely specified particular ways.[60] But if the culprit eschews the mails and carries out his scheme by interstate telephone, he is exclusively in the hands of state authorities, unless perchance the scheme involves securities[61] or use of a

[59] *Id.* at 160-161. *Cf.* Mr. Justice Rutledge's opinion at page 132. The recent filing of a petition with the United Nations by the National Association for the Advancement of Colored People complaining of anti-Negro discrimination in this country and the report of the President's Committee on Civil Liberties presage a more active role for the Federal Government in this field. Attorney General Tom C. Clark is quoted in an Associated Press dispatch of October 27, 1947, addressing the National Association of Attorneys General, as follows: ". . . in those instances where the States through negligence, or for whatever reason, fail in their obligation to protect the life and liberties of the individual citizen, we shall move with as great vigor and force as is permitted under the law." The Washington Post, Oct. 28, 1947, p. 7, col. 5.

[60] Sec. 215 of the Criminal Code, 35 STAT. 1130 (1909), 18 U. S. C. §338 (1940).

[61] Sec. 17(a) of the Securities Act of 1933, 48 STAT. 84, 15 U. S. C. §77q(a) (1940).

"facility of a national securities exchange."[62] Our national disapproval of lotteries finds expression in Section 213 of the Criminal Code, punishing not the use of the mails in furtherance of lottery schemes, as in the mail fraud statute, but only the mailing of specific kinds of lottery material and advertisements.[63] This is supplemented by Section 214, which makes the actor's status as a postal employee the basis of a general prohibition against his engaging in the sale of lottery tickets. Radio broadcasting of lottery information is a federal misdemeanor.[64] Importation or interstate transportation of the same material is a felony.[65] But it is apparently lawful from a national standpoint to transmit lottery information by interstate telephone or telegraph. Sellers of revolvers, forbidden to mail these weapons, mark their sales catalogues, "Must be shipped by express."[66]

Stealing is a federal offense if the property belongs to or is in custody of the federal government[67] or of a Federal Reserve, national, or federally insured bank.[68] Stealing is also a federal offense if the property moves as or is part of an interstate or foreign shipment, or if the property is in the possession of an interstate carrier, or of a person moving in interstate or foreign commerce by carrier, or if the property is money "arising out of or accruing from" interstate or foreign transportation and is converted by an employee of the carrier.[69] In contrast to the foregoing requirement of possession by an interstate carrier or movement as an interstate shipment, actual interstate transportation of the stolen articles is required under the National Motor Vehicle Theft Act[70] and under the National Stolen Property Act.[71] Under the Anti-racketeering Act the Federal Government may become the prosecutor of robbery or extortion which in any way or degree obstructs, delays or affects interstate or foreign commerce.[72]

Kidnaping becomes of potential federal concern as a result of the interstate or foreign transportation of the victim, the statute being obviously patterned upon the National Motor Vehicle Theft Act, to which the editors of the United States Code append it.[73] Jurisdiction might as easily have been rested on the use of the mails or means of interstate commerce in connection with the kidnaping, since ransom notes and telephone calls are a usual feature of such operations. This hiatus is

[62] Secs. 10 and 32 of the Securities Exchange Act of 1934, 48 STAT. 891, 904 15 U. S. C. §§78j, 78ff(a) (1940).

[63] 35 STAT. 1129 (1909), 18 U. S. C. §336 (1940).

[64] Federal Communications Act of June 19, 1934, 48 STAT. 1088, 47 U. S. C. §316 (1940).

[65] Sec. 237 of the Criminal Code, 35 STAT. 1136 (1909), 18 U. S. C. §387 (1940).

[66] 44 STAT. 1059 (1927), as amended, 18 U. S. C. §361 (1940). See Brabner-Smith, *Firearm Regulation*, 1 LAW & CONTEMP. PROB. 400, 405 (1934).

[67] Secs. 46 and 47 of the Criminal Code, 35 STAT. 1097 (1909), 18 U. S. C. §§99 and 100 (1940). See provisions as to stealing from the mails, Secs. 192 and 197 of the Criminal Code, 18 U. S. C. §§315-320 (1940).

[68] 48 STAT. 783 (1934), 12 U. S. C. §588a (1940); REV. STAT. §5209, as amended, 18 U. S. C. §592 (1940).

[69] 37 STAT. 670 (1913), as amended, 18 U. S. C. §409(2) (1940).

[70] 41 STAT. 324 (1919), 18 U. S. C. §408 (1940).

[71] 48 STAT. 794 (1934), 18 U. S. C. §§413-419 (1940).

[72] 48 STAT. 979 (1934), as amended, 18 U. S. C. §420a (1940).

[73] 47 STAT. 326 (1932), as amended, 18 U. S. C. §408a (1940).

partially filled by the statutory provisions relating to extortion and demand for ransom. These fall within the federal ken if the communication is transmitted in interstate commerce or through the mails but, for reasons difficult to fathom, the communication itself must *contain* the threat or demand before the Federal Bureau of Investigation or the postal inspectors can be called in. This is the more surprising since it was long ago held that letters on which a mail fraud count may be based need not contain the fraudulent misrepresentation, if in fact the letter promotes the fraudulent scheme.[74] In the case of mail fraud, letters are sufficient which merely lull the victim into a false sense of security after he has parted with his money.[75]

The foregoing list illustrates congressional employment of the following jurisdictional bases for adding federal to state sanctions against undesirable conduct: (1) use of the mails; (2) use of means of interstate commerce; (3) "affecting" commerce; (4) interstate transportation (a) of the victim, (b) of the proceeds, (c) of the criminal himself; (4) radio broadcasting; (5) status of the offender as a federal employee; (6) status of the offender as an employee of an interstate carrier; (7) use of facilities of national securities exchanges; (8) federal ownership or custody of the property; (9) ownership or custody of the property by institutions licensed by the federal government or under its protection. The list can, of course, be extended almost indefinitely with crimes resting on the tax, war, and other powers of Congress. Enough has been said, however, to show that the use of a particular jurisdictional circumstance in the definition of a federal crime only very crudely marks off the area in which either (1) a substantial national interest exists or (2) the states are incapable of effective action. The legislation reaches too far in many situations but may fall short in a particular case despite an obvious federal interest. Attention and controversy tend to focus on the jurisdictional problem rather than the substantive issues of criminality. Federal jurisdiction may turn on the distinction between transporting "with fraudulent intent" and mailing "for the purpose of executing a scheme to defraud."[76] Courts find themselves talking nonsense like the oft-repeated declaration that the use of the mails is the "gist" of the offense of mail fraud, when all that is meant is that this federal jurisdictional element must, of course, be alleged and proved.[77] To regard mailing as the essence of mail fraud is like treating the localization of the offense in Pennsylvania as the gist of a Pennsylvania prosecution for larceny. One example of the peculiar and artificial results of this attitude toward federal crime is the doctrine that each use of the mails in connection with a single

[74] Durland v. United States, 161 U. S. 306 (1896); United States v. Berg, 144 F. 2d 173 (C. C. A. 3d 1944).

[75] McNear v. United States, 60 F. 2d 861 (C. C. A. 8th 1932); United States v. Spielberger, 28 F. Supp. 380 (W. D. Va. 1939); *but cf.* Merrill v. United States, 95 F. 2d 669 (C. C. A. 9th 1938).

[76] *Compare* Kann v. United States, 323 U. S. 88 (1944) *with* United States v. Sheridan, 329 U. S. 379 (1946).

[77] United States v. Crummer, 151 F. 2d 958, 962 (C. C. A. 10th 1945), *cert. denied*, 66 Sup. Ct. 704 (holding scheme need not be alleged with same particularity as is required in pleading the mailing); United States v. Lowe, 115 F. 2d 596, 598 (C. C. A. 7th 1941), *cert. denied*, 311 U. S. 717; United States v. Quimby, 51 F. 2d 167, 170 (C. C. A. 2d 1931).

scheme constitutes a separate offense, so that the limit of the federal court's power to punish for fraud is five years multiplied by the number of different letters which the prosecutor cares to make the subject of separate counts in the indictment.[78] For a single use of the mails in connection with a nationwide fraud a defendant chances no more than five years in a federal penitentiary. Five post cards to a single victim in connection with the sale of an automobile by false representations gives the federal judge discretion to impose twenty-five years. An acquittal in one mail fraud trial will not bar a subsequent trial and conviction for the same fraud based on another letter. A count setting forth more than one mailing would be duplicitous.

Against such a background it is not surprising that a foreign court should be misled regarding the nature of our federal penal law, to an utterly impractical result. In *Re Lamar*,[79] the Supreme Court of Alberta refused an American request for extradition of Lamar for mail fraud, on the ground among others that the offense was not within the extradition treaty. The treaty did cover fraud and false pretense, and a request by the governor of a state for Lamar's extradition would have been honored. But since the national government wanted him for an offense the gist of which was mailing, the court could find no basis for giving him up, under the general principle of international extradition law that the offense must be punishable in the asylum state. Mail fraud (like other federal offenses defined by reference to particular jurisdictional features) is a unique American penological phenomenon.

Rationalization of the federal penal code would call for definitions of federal crimes in terms of the significant criminal conduct. The jurisdictional features necessary to give federal authorities power to act should be brought together in a comprehensive definition of some phrase like "within the federal jurisdiction." Such a wholesale enlargement of federal power will, of course, be unacceptable to Congress without an assurance of proper restraint in the exercise of the jurisdiction. Perhaps the first evidences of a changing attitude toward federal crime can be discerned in the pending Revision of the Criminal Code.[80] The Revision abandons the present organization of federal criminal law under captions referring to jurisdictional elements like "offenses against postal service," "offenses against foreign and interstate commerce," "offenses within admiralty, maritime and territorial jurisdiction of United States." Instead there is to be an alphabetical arrangement of offenses by nature of the conduct prohibited, *e.g.*, arson, assault, embezzlement and theft, false personation, lotteries, obscenity. Chapter 31 of the Revision, entitled Embezzlement and Theft, will bring together the various provisions of federal law dealing with these property offenses, heretofore scattered through the code under appropriate jurisdictional headings. It was found possible to consolidate eleven different sections

[78] Mitchell v. United States, 142 F. 2d 480 (C. C. A. 10th 1944), *cert. denied*, 323 U. S. 747; Bozel v. United States, 139 F. 2d 153 (C. C. A. 6th 1943), *cert. denied*, 321 U. S. 800; Holmes v. United States, 134 F. 2d 125 (C. C. A. 8th 1943), *cert. denied*, 319 U. S. 776. The practice has been disapproved. United States v. Steinberg, 62 F. 2d 77, 78 (C. C. A. 2d 1932), *cert. denied*, 289 U. S. 729 (but court held without power to interfere).

[79] 2 Western Weekly Report 471, 477 (Supreme Court of Alberta 1940).

[80] H. R. 3190, 80th Cong., 1st Sess. (1947).

into one.[81] The juxtaposition of the remaining sections revealed the need for uniformity of definition and penalties.[82] Robbery and burglary offenses—within federal territorial jurisdiction, of federal property, from federally protected banks, in a post office, or in a railroad car carrying interstate shipments—are assembled in Chapter 103. However, within the chapters the individual identity of the offenses is largely preserved, *e.g.*, transportation, mailing, and broadcasting of lottery matter remain distinct offenses and existing penalty variations depending on which jurisdictional element is invoked are retained. It will still be no federal offense to use the interstate telephone and telegraph for lottery purposes.

III

PETTY OFFENSES AND THE UNITED STATES COMMISSIONER

Few are aware of the extent to which the federal courts are occupied with petty offenses that would be handled by magistrates or police courts in the state systems. Petty offenses are defined in the federal Criminal Code as those for which the penalty does not exceed confinement in a common jail, without hard labor, for a period of six months, or a fine of not more than $500, or both.[83] Such offenses may be prosecuted on complaint, and tried summarily without a jury if Congress so provides, at least where the offense is "malum prohibitum."[84] Among the federal offenses which fall within this category are: violations of the statutes regulating hunting and conservation of migratory game,[85] unauthorized manufacture, sale, or possession of federal official insignia, unauthorized wearing of uniform of the armed services or of a federally incorporated veterans organization, fraudulent use of the emblems of the Red Cross or of the 4-H Clubs,[86] enticing workers away from a federal armory[87] petty cheating of the post office and violation of postal regulations.[88] Federal judges and prosecutors are often reluctant to employ the federal district courts for such cases. It has seemed to them inconsistent with the dignity of the national tribunal to thrust upon it the duties of a justice of the peace, as in the case of violation of the game laws, or to invoke the mighty force of the Union to assess small fines.[89] This

[81] H. REP. No. 304 on H. R. 3190, 80th Cong., 1st Sess. (1947).

[82] Reviser's notes on §§641, 645, 659 in H. REP. No. 304 on H. R. 3190, 80th Cong., 1st Sess. (1947).

[83] 46 STAT. 1029 (1930), 18 U. S. C. §541 (1940).

[84] Schick v. United States, 195 U. S. 65 (1904) (proceeding for statutory penalty for violating Oleomargarine Act; jury trial waived); *but cf.* District of Columbia v. Colts, 282 U. S. 63 (1930) (holding reckless driving malum in se, requiring jury trial). See Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 975 *et seq.* (1926).

[85] 40 STAT. 755 (1918), as amended, 16 U. S. C. §703 (1940); 45 STAT. 1222 (1929), 16 U. S. C. §715 (1940); 48 STAT. 452 (1934), 16 U. S. C. §718 (1940).

[86] These provisions are conveniently assembled in Chapter 33 of the pending Revision of the Criminal Code, H. R. 3190, 80th Cong., 1st Sess. (1947). See H. REP. No. 304 for cross references to existing sections.

[87] Sec. 43 of the Criminal Code, 18 U. S. C. §95 (1940).

[88] See Chapter 83 of the pending Revision of the Criminal Code.

[89] See NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT NO. 2 ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES (1931), H. R. DOC. No. 722, 71st Cong., 3d Sess. 56 (1931). See also REPORT No. 8 ON CRIMINAL PROCEDURE 7-8 (U. S. Government Printing Office 1931).

becomes more serious when the attitude manifests itself against prosecution of minor violations of federal regulatory measures which do not technically fall within the definition of petty offenses, *e.g.*, violations of the Fair Labor Standards Act,[90] the Food, Drug and Cosmetic Act of 1938,[91] the stowaway laws,[92] or the Emergency Price Control Act.[93]

Following a study of the petty offense problem under prohibition, President Hoover endorsed legislation recommended by the National Commission on Law Observance and Enforcement, to define "casual or slight violations," which the district attorney might prosecute on complaint, limiting punishment as in the present definition of petty offenses. Such complaints would be heard by the United States Commissioner as an arm of the district court. The Commissioner would accept pleas, hold hearings, and report cases to the district judge for sentence. The accused might, if conviction were recommended, demand jury trial in the district court, but in that event he subjected himself to the normal penalties for violating the statute.[94] Nothing came of these recommendations except the enactment of the petty offense definition previously mentioned. The principal function of the United States Commissioner under the present statutes is that of committing magistrate.[95] In recent years the statutes creating various national parks have authorized the federal district courts to designate commissioners to try violations of the park regulations and other petty offenses committed in the parks.[96] In 1940 Congress took another short step in the direction of establishing federal police courts when it enacted that any United States Commissioner specially designated for that purpose by the court might, upon consent of the defendant, try petty offenses committed within the exclusive or concurrent federal jurisdiction.[97] As in the case of the park commissioners, conviction by the Commissioner may be appealed to the district court.

It is to be expected and hoped that the Commissioner's power to deal with petty offenses will be expanded along the lines indicated in the Wickersham Commission recommendations. Recent English development has gone much further, to the extent of making serious offenses triable summarily on consent of the defendant.[98] Nor is there occasion for shock at the proposal to entrust to the federal prosecutor

[90] 52 STAT. 1069 (1938), 29 U. S. C. §216 (1940), maximum penalty for second offender six months imprisonment or $10,000 fine.

[91] 52 STAT. 1043, 21 U. S. C. §333(a) (1940).

[92] 54 STAT. 306 (1940), as amended, 18 U. S. C. §469 (1940).

[93] 56 STAT. 33 (1942), as amended, 50 U. S. C. App. §925 (Supp. 1946).

[94] SUPPLEMENTAL REPORT ON OBSERVANCE AND ENFORCEMENT OF PROHIBITION (1929), in H. R. Doc. No. 252, 71st Cong., 2d Sess. 25 (1931).

[95] REV. STAT. §1014 (1875), 18 U. S. C. §591 (1940). See Griffin, *United States Commissioners*, 29 J. AM. JUD. SOC'Y 58 (1945); United States v. Maresca, 266 Fed. 713 (S. D. N. Y. 1920).

[96] See, for example, 16 U. S. C. §§67, 100, 172, 376 (1940).

[97] 54 STAT. 1058, 18 U. S. C. §576 (1940).

[98] The Criminal Justice Act (1925) §24. See PENAL REFORM IN ENGLAND 56-58 (2d ed. 1946), edited by Radzinowitz and Turner for Department of Criminal Science, Faculty of Law, University of Cambridge. Included among the offenses triable summarily are forms of larceny, malicious mischief, perjury, and indecent assault, carrying penalties as severe as life imprisonment (*e.g.*, larceny of postal packets, Sec. 12 of the Larceny Act, 1916).

discretion to resort to a forum and procedure which limits the maximum penalty that may be imposed. In his determination whether to prosecute at all, whether to proceed in federal court or to remit the offense to state prosecutors, for what offenses to prosecute, how many substantive counts to include and whether to include a conspiracy count, the prosecutor makes decisions of much greater significance to the defendant, subject to no control whatsoever by the defendant and little by the court. Moreover, the existing discretion is exercised, as it were, *in camera,* for no one other than the district attorney and the defendant can judge the extent of its exercise, whereas the present proposal involves an overt exercise of discretion.

IV

PROSECUTOR'S DISCRETION

The role which this essay assigns to the district attorney's discretion is a large one, and it is necessary to indicate the extent to which it is consistent with our institutions. This will be done by reviewing instances of judicial, legislative, and executive recognition of the discretion, first, in relation to the institution and maintenance of criminal cases generally and, second, with specific reference to the power to forego federal prosecution where state and national jurisdiction are concurrent.

The question of the district attorney's discretionary control of criminal prosecution has arisen most often in connection with the filing of a *nolle prosequi,* and the courts have regularly refused to interfere with these voluntary dismissals of prosecution.[99] Congress, well aware of this exercise of discretion, has never challenged its existence even when the wisdom of a particular decision was under attack. In the hearing on the confirmation of Attorney General Jackson as Associate Justice of the Supreme Court, the nomination was attacked because of Jackson's failure to prosecute Drew Pearson and Robert S. Allen for criminal libel on Senator Tydings. Jackson had taken the position that it was the policy of the Department of Justice to avoid the criminal libel laws when the courts were open to the injured party in civil proceedings, and that prosecutions of this character would tend to impair freedom of the press. Republican Senator (now Mr. Justice) Burton stated:

> The prosecuting attorney, being charged, as he is charged, with the great responsibility of deciding under the laws of the United States, the laws under which he is serving, whether a case should be prosecuted, owes a duty to himself, his community, and the Constitution to decide whether the case should be prosecuted. . . . In my judgment the Attorney General was within his rights when he declined to prosecute, and in stating the grounds as he did state them under the circumstances.[100]

The Executive branch of the Federal Government has not doubted the existence

[99] United States v. Brokaw, 60 F. Supp. 100 (S. D. Ill. 1945); United States v. Woody, 2 F. 2d 262 (D. Mont. 1924). *cf.* United States v. Bioff, 40 F. Supp. 497 (S. D. N. Y. 1941). A prosecutor cannot be mandamused to prosecute. Murphy v. Sumners, 54 Tex. Cr. 369, 112 S. W. 1070 (1908); Graham v. Gaither, 140 Md. 330, 117 Atl. 858 (1922).

[100] 87 CONG. REC. 5954, 5956 (1941). See also *Hearings before the Subcommittee of the Senate Committee on the Judiciary on the Nomination of Robert H. Jackson,* 77th Cong., 1st Sess. 55, 58, 59-62, 64 (1941); *cf.* pp. 2, 13, 15 of the *Hearings* (dismissal of the Spanish loyalist recruiting indictments).

of this broad discretion in relation to prosecutions. Executive Order No. 6166 of June 10, 1933, which, among other things, centralized the prosecuting function in the Department of Justice, described that function as "decision whether and in what manner to prosecute . . . or to abandon prosecution." Attorney General Cummings' opinion accompanying this executive order reviews a line of previous opinions of Attorneys General in support of their right to pass on questions of "expediency and propriety" in conducting the government's legal business.[101] The extent to which the Department of Justice does exercise discretion in instituting prosecution has already been noted. Administrative agencies which investigate and refer cases to the Department of Justice for prosecution have developed quite explicit standards for selecting cases for penal treatment. These standards naturally reflect those of the Justice officials who have to be persuaded to proceed with the cases. Thus the Enforcement Manual of the Office of Price Administration stated the "general considerations" bearing on the selection of cases for criminal prosecution as follows:

> OPA cannot use the criminal remedy for wide coverage of offenders, as is done in England, because it would unduly flood the Federal Courts. Instead, OPA must develop techniques and criteria for choosing a relatively small number of key cases to prosecute criminally. OPA cannot in this way punish all violators who deserve criminal penalties. No prosecution should be recommended unless the case has clear significance for enforcement beyond the administering of deserved punishment.[102]

The Manual then reminded enforcement officers of alternative non-criminal sanctions—*e.g.*, injunctions, penalty suits—to be weighed against criminal proceedings in the light of relative possibilities of success, speed of disposition, and other considerations. Prosecution was to be limited to intentional or wanton violations, a stricter standard than required by the statutory "willfulness." Among wanton and intentional violators, moreover, only "strategic," or "key" cases would be prosecuted. A case might be strategic because the violator was a leader in his industry or in a key position economically so that his price violations tended to cause similar violations by others.[103] Except for flagrant cases, OPA would recommend prosecution only for the statutory misdemeanor under the Emergency Price Control Act or the Second War Powers Act, although there might be a factual basis for felony charges of conspiracy or making false statements in matters before a federal agency.[104]

In relation to the specific question of withholding federal prosecution in favor of state proceedings, reference may be made to the *Screws* opinion[105] for the Department of Justice's conception of its responsibility vis-a-vis the states for protection of civil rights. Its policy under the Fugitive Felon Act, in favor of state action, has also been mentioned. It is the practice to dismiss federal charges against persons who have served or are serving adequate sentences in state institutions.[106] In Mann

[101] 38 OPS. ATT'Y GEN. 98, 100 (1934-1937). [103] OPA Enforcement Manual, Sec. 9-1702.02.
[102] *Id.*, Sec. 9-1702.04. [104] *Id.*, Sec. 9-1702.06. [105] 325 U. S. 91 (1945).
[106] *Cf.* Sec. 9-1702.05 of the OPA Enforcement Manual: "Criminal prosecution should not be recommended when a case against the same subject is pending in the state court for an infraction of state laws related to or connected with the transaction which also involves a violation of OPA regulations. . . .

Act prosecutions the district attorneys are to ask themselves, "What reasons if any exist for thinking the ends of justice will be better served by a prosecution under federal law than under the laws of the state having jurisdiction?"[107] This echoes the opinion in *United States v. Ah Hung*,[108] a prosecution for concealing opium with knowledge that it had been imported, in which the government relied upon the statutory presumption of knowledge of importation. In response to the defendant's argument that the matter was one for state action, the court said:

> The federal jurisdiction is not exclusive. As in the case of the White Slave Act . . . the existence of some real basis for the application of interstate commerce jurisdiction should be considered by those officers of the government on whom rests the responsibility for instituting prosecution.
>
> . . .
>
> His offense is of such a nature that it would be within the discretion of the United States Attorney to allow it be dealt with under the health and penal statutes of the state, regulating the welfare of the individual, rather than under interstate or foreign transportation of opium and its use as such. But [federal] jurisdiction over the case does exist.[109]

There is at least one instance of legislation expressly authorizing United States attorneys to forego federal prosecution. Following protest by Representative Dyer, author of the National Motor Vehicle Theft Act, against the commitment of hundreds of juveniles to federal institutions,[110] Congress passed the Act of June 11, 1932,[111] declaring its preference for local handling of juvenile delinquency cases where jurisdiction is concurrent. The Act provides in part as follows:

> For the purpose of cooperating with States . . . in the care and treatment of juvenile offenders, whenever any person under twenty-one years of age shall have been arrested . . . and, after investigation by the Department of Justice, it shall appear that such person has committed a criminal offense or is a delinquent under the laws of any State that can and will assume jurisdiction . . . and that it will be to the best interest of the United States and of the juvenile offender to surrender the offender to the authorities of such State, the United States attorney of the district in which such person has been arrested is authorized to forego the prosecution of such person and surrender him as herein provided.[112]

The provisions in some of the federal theft legislation making conviction or acquittal in the state courts a bar to federal prosecution may also be regarded as an indication

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In those cases where the subject may be prosecuted either under the state or federal laws, there should be close collaboration between state and federal authorities to determine the best forum for such prosecution." See also Sec. 9-1702.04(B): ". . . There is little significance from the general enforcement point of view in prosecuting the petty criminal, especially where his conduct renders him amenable to state or federal law."

[107] Par. 138 of Instructions to United States Attorneys, Dec. 1, 1945. But see note 44, *supra*.

[108] 243 Fed. 762, (E. D. N. Y. 1917).

[109] *Id.* at 764, 765.

[110] 72 CONG. REC. 2494 (1930); see Hall, *Federal Anti-Theft Legislation*, 1 LAW & CONTEMP. PROB. 424, 428 (1934).

[111] 47 STAT. 301, 18 U. S. C. §662a (1940).

[112] *Ibid.*

of congressional sentiment in support of local responsibility.[113] Of interest also in this connection is Section 3231 of the pending Revision of the Criminal Code:

Offenses against the United States shall be cognizable in the district courts of the United States, but nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof.[114]

This section would replace Sections 24 and 256(1) of the present Judicial Code, which expressly make federal court jurisdiction over federal crimes *exclusive*.[115] Perhaps proposed Section 3231 is intended to open the door to a suggestion made twenty-two years ago by Charles Warren, that state courts be employed for prosecution of federal offenses in order to reduce the work-load of the federal courts.[116] But federal prosecutors will not prosecute for federal offenses in state courts, even if the state courts accept the jurisdiction. That has been the experience under the few federal criminal laws which expressly provide, contrary to Section 256(1) of the Judicial Code, that jurisdiction of the federal offense shall not be exclusively in the federal courts.[117] If the purpose is to authorize discretionary relinquishment to local tribunals, for prosecution *under state law*, of offenses which are only technically but not substantially within the federal concern and jurisdiction, the matter could be handled much more directly by amending Section 771 of the Revised Statutes, which makes it the "duty" of every district attorney to prosecute "all" offenses cognizable under the authority of the United States.[118] The language has, of course, not been regarded as precluding the exercise of discretion. However, if prosecutors' discretion is to be guided toward a rational coordination of federal and state criminal jurisdiction Congress should qualify this "duty to prosecute" with a generalization of the idea embodied in the Juvenile Delinquency Act. The language might be somewhat as follows:

Whenever any person is charged with any offense against the United States, and it shall appear to the satisfaction of the Department of Justice that such person has committed an offense under the laws of any state that can and will assume jurisdiction and deal with him according to the laws of such state, and that it will be to the best interests of the United States to surrender such person to the authorities of such state, the United States Attorney of the district in which such person has been arrested is authorized, subject to the regulations and instructions of the Attorney General, to forego prosecution for the federal offense and to surrender such person to the appropriate state authorities.

V

CONCLUSION

This survey points to four lines of development by which federal criminal jurisdiction can become the instrument of an intelligent national penal policy: (1) The

[113] *E.g.*, 37 STAT. 670 (1913), as amended, 18 U. S. C. §410 (1940).
[114] H. R. 3190, 80th Cong., 1st Sess. (1947).
[115] 28 U. S. C. §§41 and 371(1) (1940).
[116] Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545, 597 (1925).
[117] Bank robbery, 48 STAT. 783 (1934), as amended, 18 U. S. C. §588d (1940).
[118] 28 U. S. C. §485 (1940). The language is scheduled to be carried over substantially unchanged in §507 of the pending revision of the Judicial Code. H. R. 3214, 80th Cong., 1st Sess. (1947).

evolution of a broader, more uniform jurisdictional formula for federal criminal statutes; (2) the expansion of the power of the United States Commissioners to try petty offenses; (3) an express authorization by Congress of a general policy of remitting local offenders to local authorities; (4) articulation by the Department of Justice of a complete set of standards for the exercise of this discretion to withhold federal prosecution. With these, the use of national courts could be confined to matters of national import, and petty prosecutions could be segregated appropriately. The progressive weakening of local responsibility for local law enforcement could be halted. The new emphasis on federal-state relations might turn the Criminal Division of the Department of Justice towards a function which it has heretofore ignored: supplying leadership and technical counsel to state prosecuting agencies, helping local authorities to do their own job well rather than doing it for them. The Federal Bureau of Investigation of the Department of Justice has assumed this role within its field of policing and detection, by subsidizing, guiding, and educating local forces through its National Police Academy, Central Identification Records, Technical Laboratory, Uniform Crime Reports, and other services.[119] The Bureau of Prisons of the Department of Justice has led efforts to improve local penal institutions; it advises state prison authorities, formulates minimum standards, conducts inspections and surveys, etc.[120] The Criminal Division, too, can help reestablish effective and responsible local law enforcement not only by intelligent restraint in invoking federal criminal jurisdiction but more positively by developing and sponsoring uniform criminal legislation, procedural reforms, aids for indigent defendants, interstate compacts to facilitate apprehension of fugitives, and perhaps even personnel standards covering selection, tenure, and compensation, which will strengthen the independence of, and public confidence in, the quasi-judicial office of the prosecutor.

[119] See REP. ATT'Y GEN. 192 *et seq.* (1941).
[120] See ANN. REP. FEDERAL BUREAU OF PRISONS 37 *et seq* (1946).

JURISDICTION IN BANKRUPTCY

WILLIAM E. MUSSMAN* AND STEFAN A. RIESENFELD†

I

GENERAL FEATURES OF JURISDICTION IN BANKRUPTCY

A. Judicial Jurisdiction in Bankruptcy as Distinguished from Legislative Jurisdiction

The following study was undertaken for the purpose of describing the judicial business which is imposed upon the lower federal courts in the administration of the Bankruptcy Act of 1898, as revised by the Chandler Act of 1938.[1] Our concern here is with the problems centering around *judicial* as distinguished from *legislative* jurisdiction,[2] the latter dealing only with the powers of Congress under the bankruptcy clause of the Constitution.[3] The history of bankruptcy in the United States[4] has been summarized by Justice Cardozo as that of "an expanding concept that has had to fight its way."[5] Congressional legislation has taken the path of "progressive liberalization."[6] While, in the words of the Supreme Court, the subject of bankruptcy is incapable of final definition,[7] it may be stated generally that it covers the liquidation or rehabilitation of embarrassed estates.[8] At any rate, this is the scope of bankruptcy under the present act.

B. The Nature of Federal Jurisdiction in Bankruptcy in General

Federal jurisdiction[9] in bankruptcy covers the whole business of the federal courts in the administration of the Bankruptcy Act. It encompasses all their activities in connection with "straight" bankruptcy proceedings,[10] railroad and corporate re-

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[1] 52 STAT. 883 (1938), 11 U. S. C. §1 *ff.* (1940). We shall hereafter simply refer to the section numbers of the Act.

[2] For a discussion of the two concepts, see RESTATEMENT, CONFLICT OF LAWS §§59-73 (1934).

[3] U. S. CONST. Art I, §8, cl. 4.

[4] See CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935); Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401 (1947).

[5] Cardozo, J., dissenting in Ashton v. Cameron County Dist., 298 U. S. 513, 535 (1936).

[6] See Adair v. Bank of America Ass'n, 303 U. S. 350, 354 (1938).

[7] See Wright v. Union Central Ins. Co., 304 U. S. 502, 513 (1938).

[8] For a valiant attempt at a functional definition of bankruptcy see Radin, *The Nature of Bankruptcy*, 89 U. PA. L. REV. 1 (1940).

[9] Jurisdiction in this sense relates to the power of the federal courts to *properly* assume the determination of a case. It is, of course, recognized that "jurisdiction to decide is jurisdiction to make a wrong as well as a right decision" (Pope v. United States, 323 U. S. 1, 14 (1944)), and that this power to err applies within certain limits even to the jurisdiction itself. Jurisdiction is unfortunately, as Justice Reed has emphasized, "a word of uncertain meaning" (Driscoll v. Edison Co., 307 U. S. 104, 110 (1939)), and "competes with 'right' as one of the most deceptive legal pitfalls." Frankfurter, J., dissenting in Yonkers v. United States, 320 U. S. 685, 695 (1944).

[10] Bankruptcy Act, §§1-72.

organizations,[11] arrangements,[12] and the rehabilitation of farmers,[13] of wage earners,[14] and of embarrassed estates belonging to special classes.[15]

While the simplest solution would have been to attribute the jurisdiction to adjudicate all litigations arising in connection with an estate in liquidation or rehabilitation to that federal court in which the main proceeding is pending, this course has not been pursued. As in the whole field of federal jurisdiction, Congress has here been faced with the delicate task of distributing the jurisdiction to decide the various types of litigation which might arise under the Bankruptcy Act between the state and the federal courts—a task which frequently requires a compromise between political expediency and procedural efficiency.[16] Furthermore, Congress has had to decide not only which of the various federal courts is the most appropriate to take jurisdiction over the principal petition in a particular case[17] but also whether there should be a further allocation of the total business connected with one main proceeding among the various courts upon territorial principles. Certainly, because of the nationwide scope of the effect of the main proceedings, an attribution of all controversies arising therefrom to the court where they are pending would in some instances impose an undue burden on the parties affected. Two questions immediately arise in this connection: (1) What Congress can constitutionally do, and (2) what it has actually done.

The first question can be disposed of briefly. The scope of the bankruptcy clause in conjunction with the judiciary article of the Constitution would have permitted Congress to reserve the entire administration of the Bankruptcy Act to the federal courts[18] and to extend the territorial jurisdiction of the court in which the main proceeding pends throughout the United States.[19] But determining the extent to which Congress has exercised this power is a problem of statutory construction requiring separate investigation for each of the various proceedings under the Bankruptcy Act. The solution is beset with doubts and difficulties despite the attempted

[11] *Id.*, §§77, 101-276.

[12] *Id.*, §§301-399.

[13] *Id.*, §75. This section has expired. See note 220, *infra*.

[14] *Id.*, §§601-686.

[15] *Id.*, §§81 (local taxing agencies), 401-526 (real property arrangements), 701-703 (Maritime Commission liens).

[16] Justice Frankfurter, in his article, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499 (1928), concludes that legislation distributing the judicial business to secure a fair balance between state and federal court is particularly subject to the shifting needs of time and circumstance, occasioned primarily by the interplay of industrial and financial forces on social habit and political sentiment.

[17] See Bankruptcy Act, §§2(1), 77(a), 128, 322, 622. These provisions apparently concern "venue" rather than "jurisdiction" in the technical sense. On this distinction in general see Industrial Ass'n v. C. I. R., 323 U. S. 310, 313 (1945); 1 COLLIER, BANKRUPTCY §2.13 *ff.* (14th ed., Moore-Mulder, 1940).

[18] Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 430 (1924); Schumacher v. Beeler, 293 U. S. 367, 374 (1934); Kalb v. Feuerstein, 308 U. S. 433, 439 (1940).

[19] Toland v. Sprague, 12 Pet. 300 (U. S. 1838); United States v. Union Pac. R. R., 98 U. S. 569, 604 (1878); Continental Bank v. Rock Island Ry., 294 U. S. 648, 683 (1935); Mississippi Pub. Corp. v. Murphree, 326 U. S. 438, 442 (1946).

"scientific draftsmanship" of the great revision of 1938.[20] Jurisdiction in bankruptcy can by no means be characterized as a uniform type of exercise of the judicial power; rather, it is a *mixtum compositum* consisting of various categories and having several aspects. It is desirable that these aspects and categories be considered before we discuss the jurisdiction connected with the several "proceedings under this Act."[21]

C. General Characterization of Jurisdiction in Bankruptcy

An analysis of the federal jurisdiction in bankruptcy leads necessarily to the conclusion that it has all the general features of ordinary federal jurisdiction but possesses, at least in part, special characteristics.

1. *Jurisdiction in bankruptcy as limited jurisdiction*

As in all other matters,[22] the federal courts sitting in bankruptcy, though having very broad and far-reaching powers, are courts of limited jurisdiction.[23] Their jurisdiction exists only to the extent that it is granted in the Bankruptcy Act and the Federal Judicial Code. One of the most important consequences of this characterization relates to the problem of res judicata, both of adjudications by the federal courts sitting in bankruptcy matters vis-a-vis state courts or federal courts sitting in non-bankruptcy matters or in proceedings under the Act but of a different type, and the adjudications of these courts vis-a-vis the bankruptcy court. No uniform rule applies to these various situations, however, and the answer depends both on the type of question adjudicated and a variety of other factors which will presently appear.[24]

2. *Jurisdiction in bankruptcy as jurisdiction at law or in equity*

The federal jurisdiction in bankruptcy, in the broad sense used here (comprising all proceedings under the Bankruptcy Act as well as all controversies arising out of such proceedings), is either at law or in equity according to the circumstances of the case and the relief prayed.[25] Although the coalescence of law and equity under the new federal rules[26] has substantially decreased the significance of the

[20] Although the bankruptcy reform of 1938 was at first hailed as a masterpiece of draftsmanship and scientific lawmaking, the imperfections that are inherent in all human endeavor have become more and more apparent. Compare, for example, McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act*, 4 U. OF CHI. L. REV. 369 (1937), or *The Chandler Bankruptcy Amendatory Bill Is Enacted* [a symposium], 12 J. N. A. REF. BANKR. 124 (1938), with Mulder, *Ambiguities in the Chandler Act*, 89 U. PA. L. REV. 10 (1940).

[21] See notes 9-15, *supra*.

[22] McCormick v. Sullivant, 10 Wheat. 192 (U. S. 1825); DOBIE, FEDERAL PROCEDURE 25-6 (1928).

[23] Chicot County Dist. v. Baxter Bank, 308 U. S. 371, 377 (1940); Duggan v. Sansberry, 327 U. S. 499, 510 (1946). The statement that "The Bankruptcy Court is one of general jurisdiction" in Stoll v. Gottlieb, 305 U. S. 165, 172 n. 14 (1938), is undoubtedly a *lapsus linguae* of Justice Reed.

[24] See the discussion *infra* of the following cases: Gratiot State Bank v. Johnson, 249 U. S. 246 (1919); Stoll v. Gottlieb, 305 U. S. 165 (1938); Chicot County Dist. v. Baxter Bank, 308 U. S. 371 (1940); Kalb v. Feuerstein, 308 U. S. 433 (1940); Meyer v. Fleming, 327 U. S. 161 (1946); Heiser v. Woodruff, 327 U. S. 726 (1946); Gardner v. New Jersey, 67 Sup. Ct. 467 (1947); Feiring v. Gano, 114 Colo. 567, 168 Pac. 2d 901 (1946).

[25] See Schoenthal v. Irving Trust Co., 287 U. S. 92, 95 (1932).

[26] See 1 MOORE'S FEDERAL PRACTICE §§1.02, 2.02-2.04 (1938).

differentiation in most instances, the characterization of the bankruptcy courts as being primarily courts of equity has had important and extensive legal consequences. It has been an effective instrument in the hands of the Supreme Court in its endeavor to give the federal courts vast powers in the administration of embarrassed estates and to erect upon the rigid foundation of the Bankruptcy Act a superstructure of flexibility and adaptability enabling judicial cure both of defects in draftsmanship of the Act[27] and hardships or unfair results flowing from a literal application.[28]

3. *Jurisdiction in bankruptcy as being partly in rem, partly quasi in rem and partly in personam*

The jurisdiction exercised by the federal court in the administration of the Bankruptcy Act has been characterized in some instances as in rem and in others as quasi in rem, while in still other cases there has never been a doubt that the particular suit by or against the trustee was strictly in personam.

The adjudication in bankruptcy which establishes the status of the debtor as a bankrupt is effective and conclusive *erga omnes*.[29] The same holds true in respect to the approval of the petition in reorganization proceedings.[30] But the "collateral estoppel effect" of these decrees is limited. Thus, the facts upon which the decree is based are not conclusive except as between the parties to the proceeding.[31] For example, the adjudication based upon a preferential transfer does not establish the preferential nature of the transaction against the transferee.[32] And this applies to all elements, including the insolvency.[33] However, if a particular creditor, for instance, were to object to the confirmation of an arrangement under Section 366(4), he would be bound by the findings of the court on the issues raised before and passed upon by the court.[34] The adjudication or final approval of the reorganization petition

[27] In Securities & Exchange Comm'n v. U. S. Realty Co., 310 U. S. 434 (1940), the court invoked its equity power as a basis for holding that petitioner should have reorganized under Chapter X instead of Chapter XI in order that a great number of unsecured interests might have adequate protection, although the Act itself was silent on the point.

[28] This "inherent equitable power" has been invoked for this purpose in an ever-increasing variety of situations. Thus, *see* Pepper v. Litton, 308 U. S. 295 (1939) (disallowance of a claim either as secured or general); American Surety Co. v. Sampsell, 327 U. S. 269 (1946) (subordination of one general claim to another general claim); Heiser v. Woodruff, 327 U. S. 726 (1946) (power to go behind a claim for purposes of investigating for fraud, limited only by principles of res judicata); Vanston Bondholders Protective Com. v. Green, 67 Sup. Ct. 237 (1947) (disallowance of a contractual claim despite its validity under state law).

[29] Michaels v. Post, 21 Wall. 398, 428 (U. S. 1874); New Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656, 661 (1875); Manson v. Williams, 213 U. S. 453, 455 (1909); Gratiot State Bank v. Johnson, 249 U. S. 246, 248 (1919); Meyers v. International Co., 263 U. S. 64, 73 (1923).

[30] Bankruptcy Act, §149; 6 COLLIER, BANKRUPTCY §6.13 (14th ed., Moore-Oglebay, 1947).

[31] Manson v. Williams, 213 U. S. 453 (1909); Gratiot State Bank v. Johnson, 249 U. S. 246 (1919). In an involuntary petition only the petitioning creditors are parties. While other creditors may intervene, they can appear only in favor of the petition. Bankruptcy Act, §59(f). On the other hand, in reorganization proceedings the creditors may appear against the petition. Bankruptcy Act, §§137, 144.

[32] Gratiot State Bank v. Johnson, 249 U. S. 246 (1919).

[33] *Ibid.;* Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 429-430 (1924); Liberty Nat. Bank v. Bear, 265 U. S. 365, 370 (1924).

[34] *Cf.* Friend v. Talcott, 228 U. S. 27, 41 (1913); Myers v. International Co., 263 U. S. 64 (1923).

prevents collateral attack in any other court.[35] Orders of general application by the court, such as those granting discharges and confirming reorganization or arrangement plans, bind all parties to whom the decree purports to apply even though the court assumed jurisdiction over the subject matter erroneously by misconstruing the provisions of the statute[36] or by failing to appreciate its unconstitutionality.[37]

The jurisdiction of the court attaches from the filing of the petition and extends to all property in the actual or constructive possession of the bankrupt, thereby placing it *in custodia legis*. The filing of the petition is "a caveat to all the world"[38] except in so far as the Bankruptcy Act specifically protects persons dealing with the debtor.[39]

Special consideration must be given to the nature of the jurisdiction of the court in allowing or disallowing claims against the estate. The Supreme Court has recently emphasized that such adjudications are not of actions in personam but of claims against assets only.[40] This position can conceivably have important consequences with respect to the res judicata effects of such allowance or disallowance. Adjudications of "claims with respect to assets" are commonly called quasi in rem and have not the usual effect of giving rise to an action in debt or estoppel by verdict.[41] For straight bankruptcy proceedings, it could consequently be argued with plausibility that the allowance or disallowance of a claim by the referee for the reason that he considers it as proved or not proved is not res judicata in a later suit by the creditor against the bankrupt.[42] It could hardly be contended that privity exists between

[35] This is expressly provided for by §149. The section is construed in Duggan v. Sansberry, 327 U. S. 499 (1946) (holding that the bankruptcy court whose proceedings are stayed under §113 may not question even a preliminary *ex parte* approval).

[36] Stoll v. Gottlieb, 305 U. S. 165 (1938), noted in 23 MINN. L. REV. 673 (1939).

[37] Chicot County Dist. v. Baxter Bank, 308 U. S. 371 (1940).

[38] Mueller v. Nugent, 184 U. S. 1, 14 (1902); May v. Henderson, 268 U. S. 111, 117 (1925); Gross v. Irving Trust Co., 289 U. S. 342, 344 (1933).

[39] The principal provisions protecting persons dealing with the bankrupt are §§70(d) and 21(g). For details see 4 COLLIER, BANKRUPTCY §§70.66-.68 (14th ed., Moore-Oglebay, 1942) and 2 COLLIER, BANKRUPTCY §21.30 (14th ed., Moore-Oglebay, 1940).

[40] Meyer v. Fleming, 327 U. S. 161, 170 (1946); Gardner v. New Jersey, 67 Sup. Ct. 467 (1947). However, Justice Douglas, who wrote the opinions in both of these cases, called the proof and allowance of claims in a receivership case "strictly a proceeding in personam" in Morris v. Jones, 67 Sup. Ct. 451, 455 (1947). These views are hardly consistent.

[41] RESTATEMENT, JUDGMENTS §§32, 76(2) (1942).

[42] The contrary position is maintained by 3 COLLIER, BANKRUPTCY §57.14 (14th ed., Moore-Oglebay, 1941) and 2 REMINGTON, BANKRUPTCY §1003 (4th ed. 1940). However, only a few of the cases cited by the authors in favor of their view have actual holdings to that effect. For examples of those which do so hold, *see* Elmore-Q. & Co. v. Henderson-M. Merc. Co., 179 Ala. 548, 60 So. 820 (1913) (allowance *held* res judicata in later suit against bankrupt, precluding defense of ultra vires); Blanks v. West Point Who. Gro. Co., 225 Ala. 74, 142 So. 49 (1932) (allowance *held* res judicata as to existence of claim in later suit); Hargadine-M'Kittrick Co. v. Hudson, 122 Fed. 232 (C. C. A. 8th 1903) (disallowance because of statute of limitations bars later suit in state court); National Surety Co. v. Jean, 36 F. 2d 468 (C. C. A. 6th 1929) (disallowance held binding on surety of creditor on attachment bond).

It should be observed, however, that the Supreme Court has not committed itself on the question. Lesser v. Gray, 236 U. S. 70 (1915), which is frequently cited in this connection, held merely that a claim which was disallowed, though erroneously, was discharged if otherwise dischargeable and is therefore no basis for a recovery. *Accord* with the view in the text, *semble*, *In re* McChesney, 58 F.2d 340 (S. D. Cal. 1931). Even the cases which intimate that a disallowance might be invoked by the bankrupt are careful to point out that the disallowance must be based on the invalidity of the claim and not on other grounds.

the trustee and the bankrupt in respect to the latter's exempt or post-bankruptcy assets[43] (although the situation is different in arrangements and reorganizations where the debtor upon termination reacquires his assets). The bankrupt is not a "party" to the proceedings relating to the proof and allowance of claims unless he was actually permitted to object.[44] It must be noted, of course, that, with the exception of suits against the bankrupt for the sole purpose of charging sureties on bonds given to obtain the release of attached or garnished property or for the purpose of perfecting attachments or garnishments of property not covering the whole amount of the claim, the problem can normally arise only where the creditor sues upon a claim which is either provable but not dischargeable or where the discharge has been withheld. Otherwise the discharge would preclude a recovery, regardless of the allowance or disallowance by the referee.[45] As between the trustee and the creditor the issues which determine the allowance or disallowance should be res judicata, *e.g.*, the preferential character of a transfer.[46]

Of course, actions *by* the trustee, such as suits for the recovery of preferences, are clearly in personam.

4. Jurisdiction in bankruptcy as being partly exclusive and paramount and partly concurrent

Jurisdiction in the administration of the Bankruptcy Act is in some aspects concurrent with and in other aspects exclusive of that of the state courts. The general rule is that federal jurisdiction is concurrent unless a specific statute or the Federal Judicial Code has made it exclusive under a power which is within the legislative jurisdiction of Congress.[47] But even where the jurisdiction over the subject matter is clearly within the concurrent jurisdiction of the federal and state courts, a "rule of comity" has been developed by the Supreme Court to the effect that in proceedings involving the administration of assets which place the assets *in custodia legis* the jurisdiction of the court which attaches first may not be disturbed—thus making such

[43] A judgment in personam obtained by a creditor against the bankrupt before the filing of the petition is, of course, res judicata against the trustee. Heiser v. Woodruff, 327 U. S. 726 (1946). A judgment obtained by a creditor against the bankrupt after the filing of the petition has been considered as not binding on the trustee, 1 COLLIER, BANKRUPTCY §11.09, p. 1172 (14th ed., Moore-Mulder, 1940); however, a judgment rendered after the filing of the petition in a suit begun by the bankrupt before that date concludes the trustee even if he has not intervened. Meyer v. Fleming, 327 U. S. 161, 166 n. 8 (1946).

[44] Whether the bankrupt has a right to object to the allowance of the claim depends on various factors. See 3 COLLIER, BANKRUPTCY, §57.17 (14th ed., Moore-Oglebay, 1941); 2 REMINGTON, BANKRUPTCY §1025 (4th ed. 1940). But if the disallowance or allowance were res judicata, there certainly should be such a right in the case of non-dischargeable debts or where the discharge may be withheld.

[45] Lesser v. Gray, 236 U. S. 70 (1915).

[46] Ullman v. Coppard, 246 Fed. 124 (C. C. A. 5th 1917); Lincoln v. People's Nat'l Bank, 260 Fed. 422 (E. D. Mich. 1919); Metz v. Knobel, 21 F.2d 317 (C. C. A. 2d 1927); Schwartz v. Levine & Malin, 111 F.2d 81 (C. C. A. 2d 1940); Feiring v. Gano, 114 Colo. 567, 168 P.2d 901 (1946). Whether the conclusive effect extends to the issue of value is in dispute. See 3 COLLIER, BANKRUPTCY §60.59 (14th ed., Moore-Oglebay, 1941). By the same token, a turn-over order against the bankrupt establishes conclusively his duty to surrender which can be enforced in a state court. Sampsell v. Gittelman, 55 Cal. App. 2d 208 (1942); Fisher v. Medwedeff, 184 Md. 167, 40 Atl. 2d 360 (1944).

[47] DOBIE, FEDERAL PROCEDURE 39 (1928).

jurisdiction "exclusive."[48] Interference is deemed to exist, however, only when jurisdiction is exercised directly over the assets and not when mere in personam or otherwise non-conflicting action is taken.[49] Conversely, the jurisdiction over the assets draws to the court the "exclusive" power to adjudicate all controversies relating to the protection, collection, and distribution of such assets.[50] The courts possess the necessary powers to issue all orders and writs protecting their jurisdiction.[51]

In like manner the federal courts, in the administration of the Bankruptcy Act, acquire upon the filing of the petition either in bankruptcy, reorganization, or arrangement proceedings exclusive jurisdiction over all the property in the actual or constructive possession of the debtor.[52] This is recognized for straight bankruptcy by the Federal Judicial Code,[53] for reorganization and arrangement by the Bankruptcy Act itself.[54] The bankruptcy court, like the federal court under general equity principles, has the power to determine all controversies relating to such assets and to protect its jurisdiction by the necessary writs,[55] the Judicial Code specifically authorizing injunctions against proceedings in state courts.[56]

But the exclusive jurisdiction of the federal courts in the administration of the Bankruptcy Act goes even farther than that based on the comity concept regulating the conflict between courts of otherwise concurrent jurisdiction. Pursuant to its legislative powers under the bankruptcy clause of the Constitution, Congress has, by specific provisions in the Bankruptcy Act which vary for different types of proceedings, authorized the federal courts to deprive the state courts of jurisdiction which they otherwise would have under comity principles. In this respect bank-

[48] Farmers' Loan & Trust Co. v. Lake St. El. R. R., 177 U. S. 51, 61 (1900); Kline v. Burke Constr. Co., 260 U. S. 226, 231 (1922); Harkin v. Brundage, 276 U. S. 36, 43 (1928); Penn Co. v. Pennsylvania, 294 U. S. 189, 195 (1935); Pennsylvania v. Williams, 294 U. S. 176, 183 (1935); Gordon v. Washington, 295 U. S. 30, 35 (1935); United States v. Klein, 303 U. S. 276, 281 (1938); Princess Lida v. Thompson, 305 U. S. 456, 466 (1939); Toucey v. N. Y. Life Ins. Co., 314 U. S. 118, 135 (1941); Fischer v. American United Ins. Co., 314 U. S. 549, 554 (1942). See Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 359 (1930).

[49] Riehle v. Margolies, 279 U. S. 218, 223 (1929); Commonwealth Co. v. Bradford, 297 U. S. 613, 619 (1936); United States v. Klein, 303 U. S. 276, 281 (1938); Fischer v. American United Ins. Co., 314 U. S. 549, 554 (1942).

[50] Farmers' Loan & Trust Co. v. Lake Street El. R.R., 177 U. S. 51, 61 (1900); Riehle v. Margolies, 279 U. S. 218, 223 (1929) and cases cited; Princess Lida v. Thompson, 305 U. S. 456, 466 (1939). In receivership cases this jurisdiction over controversies resulting from the "attractive force" of the main proceeding (see Risenfeld, *Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401, 410 *ff.* (1947)) has been called "ancillary jurisdiction." See Wabash R. R. v. Adelburt College, 208 U. S. 38, 54 (1908); Barnette v. Wells Fargo Nat'l Bank, 270 U. S. 438, 450-51 (1926).

[51] Riehle v. Margolies, 279 U. S. 218, 223 (1929). The power exists under §262 of the Federal Judicial Code rather than under §265. Julian v. Central Trust Co., 193 U. S. 93, 112 (1904); Toucey v. N. Y. Life Ins. Co., 314 U. S. 118, 134 (1941).

[52] *See Ex parte* Baldwin, 291 U. S. 610, 615 (1934); Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 737 (1931); Straton v. New, 283 U. S. 318, 321 (1931) and cases cited.

[53] Sec. 256, REV. STAT. §711 (1875), 28 U. S. C. §371 (1940).

[54] Bankruptcy Act, §§111, 311.

[55] Bankruptcy Act, §2(15). *See* Steelman v. All Continent Co., 301 U. S. 278, 289 (1937).

[56] Federal Judicial Code §265, REV. STAT. §720 (1875), 28 U. S. C. §379 (1940). See Toucey v. N. Y. Life Ins. Co., 314 U. S. 118, 132 (1941).

ruptcy jurisdiction is "paramount and exclusive."[57] Thus, bankruptcy, reorganization, or arrangement proceedings supersede general[58] state receiverships,[59] with the limitation that in straight bankruptcy the appointment, if otherwise valid,[60] must have been made within four months prior to the petition. In certain circumstances the bankruptcy court may stay proceedings in personam pending in other courts.[61] The paramount character of the bankruptcy jurisdiction expresses itself also in the limited res judicata effect of state adjudications rendered in violation of the bankruptcy jurisdiction,[62] and in the power of the bankruptcy courts to prevent continuing misapplications of the Bankruptcy Act in state courts.[63]

Where the exclusive jurisdiction of the bankruptcy courts exists, it has been said that no power is given to surrender it to the state courts.[64] But it is now understood that the bankruptcy court may permit or even require the trial of certain litigation in the state courts or release overencumbered assets.[65]

In a number of cases in which the trustee is a party, the jurisdiction of state courts and federal courts is concurrent either on general principles expressly retained by the Bankruptcy Act or by virtue of specific provisions of the Act to that effect. Thus, for instance, the trustee's suit to recover assets the disposal of which by the debtor amounted to a preferential transfer[66] or a fraudulent conveyance[67] can be brought in either the bankruptcy or a state court. Whether in all or some of the instances of concurrent jurisdiction the defendant has a right of removal from a state to the federal court is a question bristling with complicated issues on which there is a scarcity of direct authority.[68]

[57] Gross v. Irving Trust Co., 289 U. S. 342, 344 (1933); Brown v. Gerdes, 321 U. S. 178, 184 (1944).

[58] Emil v. Hanley, 318 U. S. 515, 519 (1943).

[59] Bankruptcy Act, §2(a)(21).

[60] If the appointment of the receiver or assignee in insolvency was made pursuant to a statute which is suspended because of its conflict with the Bankruptcy Act, the four-months limitation does not prevent the federal court's assertion of its jurisdiction over the assets. *See* Emil v. Hanley, 318 U. S. 515, 520 n. 4 (1943); Straton v. New, 283 U. S. 318, 327 (1931). Whether the appointment of a receiver for the purpose of "winding up" an insolvent corporation on the petition of a creditor pursuant to a state statute comes within this rule or is excepted by implication of the Bankruptcy Act is a difficult question on which state supreme courts and lower federal courts are in conflict. See 25 MINN. L. REV. 103 (1940); 30 MINN. L. REV. 638 (1946).

[61] See Bankruptcy Act, §§11, 113, 116(4), construed in Foust v. Munson S. S. Lines, 299 U. S. 77 (1936).

[62] Kalb v. Feuerstein, 308 U. S. 433 (1940).

[63] Local Loan Co. v. Hunt, 292 U. S. 234 (1934). See Comment, 25 MINN. L. REV. 790 (1941).

[64] U. S. Fidelity Co. v. Bray, 225 U. S. 205, 218 (1912); Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 739 (1931). See note 120, *infra*.

[65] *Ex parte* Baldwin, 291 U. S. 610, 619 (1933); Thompson v. Magnolia Pet. Co., 309 U. S. 478, 483 (1940); Mangus v. Miller, 317 U. S. 178, 186 (1942); Prudence Corp. v. Ferris, 323 U. S. 650 (1945); Gardner v. New Jersey, 67 Sup. Ct. 467, 477 (1947).

[66] Bankruptcy Act, §60(b).

[67] *Id.*, §§67(e), 70(e)(3).

[68] *Cf.* 2 COLLIER, BANKRUPTCY §23.21 (14th ed., Moore-Oglebay, 1940). At least four types of cases where the trustee is a party to proceedings in a state court must be distinguished: (1) He may sue in the state court by virtue of §23(a) and (b) (first clause) as the "universal successor" (See Clark v. Williard, 292 U. S. 112, 114 (1934)) of the bankrupt with respect to the assets enumerated in §70,

Another important problem which arises, particularly in reorganization proceedings, is the question whether, apart from the exercise of the jurisdiction in rem and the express provisions of the Bankruptcy Act, the federal courts have exclusive or concurrent jurisdiction over controversies relating to the estate. The answer depends largely on the interpretation of Sections 2 and 23 of the Bankruptcy Act and

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provided that the cause of action is not within the exclusive jurisdiction of the federal courts *apart* from bankruptcy; (2) he may sue in the state court on a "non-inherited cause of action" (Herget v. Central Bank Co., 324 U. S. 4, 8 (1945)) vested in him as representative of the creditors by the Bankruptcy Act, §§60 (preferential transfers), 67 and 70(e) (fraudulent conveyances) in conjunction with §23(b); (3) he may sue on a cause of action originating in him as a consequence of his administration, although it is not free from doubt whether such an action is within the exclusive jurisdiction of the bankruptcy court (see *infra*, Topic D); (4) he may be sued in a state court for acts of his administration pursuant to Rule 66 of the Federal Rules of Civil Procedure (28 U. S. C. following §723(c) (1940)) in connection with §66 of the Federal Judicial Code (24 STAT. 554 (1887) as amended, 28 U. S. C. §125 (1940)). *Cf.* McGreavey v. Straw, 90 N. H. 130, 5 A.2d 270 (1939); Robinson v. Trustees, 318 Mass. 121, 60 N. E. 2d 593 (1945); Vass v. Conron Bros. Co., 59 F.2d 969 (C. C. A. 2d 1932).

In these four types of cases concurrent original federal jurisdiction may or may not exist. In respect to Class (1), concurrent federal jurisdiction must be predicated either on the existence of a federal question or diversity of citizenship between the *bankrupt* and the defendant. The Bankruptcy Act in this respect generalizes the principle underlying the celebrated "assignee clause" of §24 of the Federal Judicial Code. The mere fact that the trustee in bankruptcy is a party does not constitute a federal question in accord with the rule pertaining to federal receivers. Barnette v. Wells Fargo Nevada Nat. Bank, 270 U. S. 438 (1925); Bush v. Elliott, 202 U. S. 477 (1906); Lovell v. Newman, 227 U. S. 412 (1913); Gableman v. Peoria Ry., 179 U. S. 335 (1900). In Class (2) concurrent jurisdiction exists by fiat of the Bankruptcy Act, although a suit based on §70(e) does not necessarily involve a federal question. Whether in Class (3) there is concurrent federal jurisdiction independently of diversity of citizenship or the existence of a federal question depends on the construction of §§2(a)(7) and 23. See *infra*, Topic D. If diversity of citizenship be required, apparently the trustee's citizenship would be the controlling factor, a result in accord with the rule announced by the courts in respect to quasi-assignee receivers (apparently in disregard of the "assignee" clause). Relfe v. Rundle, 103 U. S. 222 (1880); Irvine v. Bankard, 181 Fed. 206 (C. C. Md. 1910); *but cf.* Sere v. Pitot, 6 Cranch 332 (U. S. 1810). Finally, in Class (4) federal jurisdiction must be predicated either on diversity of citizenship between the plaintiff and the trustee or on the presence of a federal question.

Removability presupposes generally, of course, that concurrent original federal jurisdiction could have been invoked by the plaintiff. The only exception in this respect which might be important here concerns the removal of certain causes against officers of federal courts under §33 of the Judicial Code. However, even in this instance it is thought that the general rule will apply, in as much as the field is narrowly restricted to acts done under specific orders. *Cf.* Gay v. Ruff, 292 U. S. 25, 31 (1934). As an example of the general rule, it has been held that removability of a suit falling under Class (1) on grounds of diversity requires diversity of citizenship between the bankrupt and the defendant. Whitman v. Chicago & N. W. Ry., 70 F. Supp. 9 (D. Minn. 1947). However, where the citizenship of the bankrupt controls the original jurisdiction, no additional diversity of citizenship between trustee and defendant should be required for removal purposes; this follows by analogy from the law relating to the "assignee" clause. The removability of actions under Class (2) raises further questions. In the first place, it is not clear whether or not the wording and history of §§23(b), 60, 67 and 70 indicate that the choice of the forum by the trustee should be final, unlike the result under §23(a) and the first clause of §23(b), which put the trustee in the exact position of the bankrupt. The exclusion of a removal would be in consonance with many express provisions in modern statutes (see the list in Gay v. Ruff, 292 U. S. 25, 36 n. 17 (1934)) and the construction which the majority of lower federal courts have placed upon §16 of the Fair Labor Standards Act (52 STAT., 1068 (1938), 29 U. S. C. §216 (1940)). Crouse v. North American Aviation, 68 F. Supp. 934 (W. D. Mo. 1946); Young v. Arbyrd Compress Co., 66 F. Supp. 241 (E. D. Mo. 1946), and cases cited. If this view is not accepted, removability might be based upon the federal nature and regulation of the cause of action involved when the suit is under §60(b) or 67(e). However, in a suit under §70(e) no federal question seems to be involved, and while original federal jurisdiction is given by the Act without diversity, removal would seem to require diversity between the defendant and the *trustee* (rather than the creditor from whom the trustee derives the right).

Sections 24 and 256 of the Federal Judicial Code, a question which we discuss below.

5. Jurisdiction in bankruptcy, summary and plenary

The jurisdiction which the federal courts exercise in the administration of the Bankruptcy Act is either plenary or summary. The Act itself does not specify when summary jurisdiction is permissible except in a few cases.[69] In some instances there is reference to cases "where plenary proceedings are necessary."[70] It is now well settled, however, that summary proceedings are permissible in purely administrative matters, and in all controversies over assets either where such assets are in the actual or constructive possession of the bankruptcy court and not held adversely under an ingenuous and substantial claim or where the defendant consents to the summary jurisdiction of the court.[71] Interestingly, the court has the power to determine by summary proceedings whether the claim of the one in possession is ingenuous and substantial.[72] The practice in summary proceedings is largely regulated by the General Orders in Bankruptcy[73] issued under Sections 30 and 75b of the Bankruptcy Act, while the practice in plenary proceedings follow the Federal Rules of Civil Procedure. However, even in summary proceedings the Federal Rules are followed in so far as they are not inconsistent with the Act or the General Orders.[74] The principal difference[75] consists in the fact that summary jurisdiction is usually exercised in the first instance by the referee rather than the judge, whereas the latter must hear all plenary suits.[76]

6. Jurisdiction in bankruptcy, territorial or nationwide

It has been mentioned above that Congress has the power to give the federal district courts nationwide jurisdiction but that it is a question of statutory law whether it has done so in a given case. The Bankruptcy Act has caused considerable confusion in this respect.

According to the wording of the statute, the federal courts which exercise original jurisdiction in bankruptcy[77] are invested with this jurisdiction "within their respective territorial limits."[78] With respect to railroad and corporate reorganizations and arrangement proceedings, the Act contains the additional provision that the court

[69] Bankruptcy Act, §§67(a)(4), 57(l), 70(a)(8). See Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 431 n. 7 (1924).

[70] Bankruptcy Act, §§60(b), 67(e), 70(e)(3).

[71] See Cline v. Kaplan, 323 U. S. 97 (1944) and cases there cited.

[72] Mueller v. Nugent, 184 U. S. 1, 15 (1902); May v. Henderson, 268 U. S. 111, 116 (1925). It may be noted that Justice Frankfurter has recently made the following comment on this test: "Possession, actual or constructive, is a legal concept full of pitfalls. Even where only private interests are involved the determination of possession, as bankruptcy cases, for instance, abundantly prove, engenders much confusion and conflict." Mexico v. Hoffman, 324 U. S. 30, 40 (1945).

[73] See 11 U. S. C. A. following §53.

[74] *Id.*, G. O. 37.

[75] 2 COLLIER, BANKRUPTCY §23.02 *ff.* (14th ed., Moore-Oglebay, 1940).

[76] *Id.*, §§38.02, 38.09; Page v. Arkansas Gas Corp., 286 U. S. 269 (1932).

[77] Bankruptcy Act, §1(10).

[78] *Id.*, §2(a).

possesses jurisdiction over the property of the debtor *wherever located*,[79] and it has been held that these words apply to property located outside as well as inside the district of the domiciliary court.[80] While there is no similar specific provision in the Act governing straight bankruptcy, it is questionable whether the omission produces a substantial difference from the reorganization proceeding. This conclusion is substantiated by the fact that the "wherever located" clause was inserted in the sections on reorganization and arrangements by Congress for the purpose of eliminating the defects existing under the old federal chancery receiver practice.[81] The Supreme Court has repeatedly stated that since all property of the debtor "wherever located" vests in the trustee upon his appointment, the court of bankruptcy at least thereby acquires exclusive jurisdiction over the assets, even if outside the district, to the extent that they are in the actual or constructive possession of its officer.[82] But there are decisions by the Court which indicate that even without and before the appointment of the trustee, where the jurisdiction cannot be predicated upon the actual or constructive possession of the court's officer, the assets held by the bankrupt in any district are placed *in custodia legis* upon the filing of the petition,[83] and that the primary court of bankruptcy acquires full jurisdiction over such assets at that time.[84] The Court has held that as a consequence of such jurisdiction the domiciliary court may order and confirm the sale of lands located in another district.[85]

The acquisition of this jurisdiction over the property has been held to entitle the court to protect it against any interference, by judicial proceedings or otherwise, and to extend its process for that purpose outside its territorial limits. To be sure, the Supreme Court has decided this point only for reorganization proceedings.[86] And it has in two older cases used very strong language to the effect that in straight bankruptcy proceedings the domiciliary court can issue process only within its district and that if protective action be required outside it must be taken by the bankruptcy court in that particular district in ancillary proceedings.[87] But although the majority of the lower federal courts have relied on these cases,[88] the Supreme Court has

[79] *Id.*, §§77(a), 111, 311. It should be noted that under the wording of §77 the jurisdiction over property "wherever located" attaches only after the approval of the petition, while under §§111 and 311, in contradistinction to the wording of former §77B, the filing of the petition controls. The change was made to eliminate the existing confusion. See 1 GERDES, CORPORATE REORGANIZATION §243 *ff.* (1936); 2 *id.*, §852; 6 COLLIER, BANKRUPTCY §3.04 (14th ed., Moore-Oglebay, 1947).

[80] Continental Bank v. Rock Island Ry., 294 U. S. 648, 683 (1935).

[81] 1 GERDES, CORPORATE REORGANIZATION §14 (1936); 2 *id.* 1413 n. 13.

[82] Isaacs v. Hobbs Tie & T. Co., 282 U. S. 734, 737 (1931); Gross v. Irving Trust Co., 289 U. S. 342, 344 (1933); 2 GERDES, CORPORATE REORGANIZATION 1365 *ff.* (1936).

[83] Acme Harveter Co. v. Beekman Lumber Co., 222 U. S. 300 (1911).

[84] Robertson v. Howard, 229 U. S. 254, 261 (1913).

[85] *Ibid.*

[86] *Ex parte* Baldwin, 291 U. S. 610, 615 (1934); Continental Bank v. Rock Island Ry., 294 U. S. 648, 683-4 (1935).

[87] Babbitt v. Dutcher, 216 U. S. 102, 114 (1910); Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 311 (1911).

[88] *See*, for example, Staunton v. Wooden, 179 Fed. 61 (C. C. A. 9th 1910); Guaranty Trust Co. v. David, 49 F.2d 866 (C. C. A. 8th 1931); Noll v. Hodgson, 70 F.2d 19 (C. C. A. 4th 1934); 1 COLLIER, BANKRUPTCY §2.11 (14th ed., Moore-Mulder 1940). In Mar-Tex Realization Corp. v.

recently made statements indicating that there is no difference between straight bankruptcy and reorganization proceedings in this respect and that resort to ancillary courts is proper but not necessary.[89] Of course, if there is in fact no infringement of the court's jurisdiction there is no cause for nationwide action.[90] Since the jurisdiction of the reorganization court is more inclusive than that of the bankruptcy court a wider range of protective action may be authorized and necessary,[91] but otherwise "the exclusive jurisdiction granted the reorganization court . . . is that which bankruptcy courts have customarily possessed."[92]

Where plenary proceedings are necessary the territorial limits of the court must be observed. This follows directly for straight bankruptcy proceedings from Section 23(a) with respect to suits which are regulated by this provision; and there are no apparent reasons why the same rule should not apply to suits in the bankruptcy courts under Sections 60, 67, and 70. In reorganizations under Chapter X, Section 23 is made specifically inapplicable. Nevertheless, the lower federal courts have held that their jurisdiction can be exercised only over persons in the district,[93] and the Supreme Court has recently referred to this rule without disapproval.[94]

D. The Legislative Technique of Regulating the Jurisdiction in Bankruptcy

Up to this point questions have been left open which depend directly upon the systematic scheme underlying the various provisions in the Bankruptcy Act regulating the jurisdiction of the courts in its administration. This has been done because the subject has recently been dealt with by the Supreme Court[95] in a decision which overturns long-established views based on former cases and which carries implications which can be appreciated only in the light of the previous discussion.

The case involved an action in the District Court for the Southern District of New York for an accounting and other relief, brought by trustees who had been appointed by the District Court for the Eastern District of Virginia in a reorganization proceeding under Chapter X. The grounds for federal jurisdiction invoked were the provisions in the Judicial Code relating to suits arising under laws of the United States[96] and to "all matters and proceedings" in bankruptcy.[97] The district court

Wolfson, 145 F.2d 360, 362 (C. C. A. 2d 1944), Judge Clark volunteered the following language in a reorganization case: "Unlike the territorially limited jurisdiction of the bankruptcy court in an ordinary liquidation proceeding, the summary power of a reorganization court is complete throughout the country."

[89] *Ex parte* Baldwin, 291 U. S. 610, 615 (1934).

[90] See United States v. Tacoma Oriental S. S. Co., 86 F.2d 363, 368 (C. C. A. 9th 1936) ("Jurisdiction over a person outside the lower court's jurisdiction is given to the lower court only if such person is in some manner invading, interfering, or disposing of the debtor's res, and then only to the extent of preventing or forestalling the invasion, interference or disposition of such res."). Thus, it is improper for the court to order a person outside the district to execute a deed for the purpose of clearing title to an asset of the estate. *In re* Lansley, 7 F.2d 888 (C. C. A. 2d 1925).

[91] See Continental Bank v. Rock Island Ry., 294 U. S. 648, 676 (1935).

[92] Meyer v. Fleming, 327 U. S. 161, 164 (1946).

[93] *In re* Standard Gas & Electric Co., 119 F.2d 658, 664 (C. C. A. 3d 1941).

[94] Williams v. Austrian, 67 Sup. Ct. 1443, 1452 n. 46 (1947).

[95] Williams v. Austrian, 67 Sup. Ct. 1443 (1947).

[96] REV. STAT. §§563, 629 (1875), 28 U. S. C. §41(1) (1940).

[97] REV. STAT. §§563, 629 (1875), 28 U. S. C. §41(19) (1940).

dismissed for want of jurisdiction,[98] but the Circuit Court of Appeals reversed[99] and, on certiorari, the Supreme Court affirmed.

The fundamental question involved was the scope of the grant of jurisdiction in Section 2 of the Bankruptcy Act and its relation to Section 23, which, by a specific provision added by the revision of 1938,[100] is made inapplicable to reorganization proceedings under Chapter X. Section 2(a) confers upon all bankruptcy courts

> . . . such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act . . . to . . .
>
> (7) Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided . . .

Section 23 provides:

> a. The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings under this Act, between . . . trustees as such and adverse claimants concerning the property acquired or claimed by the . . . trustees, in the same manner and to the same extent as though such proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.
>
> b. Suits by the . . . trustee shall be brought or prosecuted only in the courts where the bankrupt might have brought or prosecuted them if proceedings under this Act had not been instituted, unless by consent of the defendant, except as provided in sections 60, 67, and 70 of this Act.

The juxtaposition of these two sections presented the following alternative analyses of their interrelationship: (1) Section 2 grants power to the bankruptcy court to adjudicate all questions involving the administration of the Bankruptcy Act except in so far as this jurisdiction is limited and qualified by Section 23; (2) Section 2 grants only a limited jurisdiction to be exercised in summary proceedings and Section 23 adds the regulation or grant of jurisdiction over plenary suits.

As long as Section 23 was applicable to all "proceedings in bankruptcy," the question was chiefly of theoretical interest, since the scope of plenary jurisdiction, except perhaps in one instance,[101] was determined by Section 23. But, as pointed out by the court in the *Austrian* case,[102] the elimination of Section 23 from proceedings under Chapter X brought the problem to immediate practical significance in

[98] 67 F. Supp. 223 (S. D. N. Y. 1946).

[99] 159 F.2d 67 (C. C. A. 2d 1947).

[100] Bankruptcy Act, §102.

[101] The only instance in which the question might have arisen before the amendment of 1938 concerned causes of action arising in the person of the trustee. See note 68, *supra*, under Class (3). It has been argued by Ross, *Federal Jurisdiction in Suits by Trustees in Bankruptcy*, 20 IOWA L. REV. 565, 582 (1935), that Section 23 did not apply to this type of action because the bankrupt could not have sued upon it, and that jurisdiction was conferred by §2(a)(7). If this view is correct, as suggested by 2 COLLIER, BANKRUPTCY §23.16, n. 12 and text (14th ed., Moore-Oglebay, 1940), the further problem immediately arises whether this grant of plenary jurisdiction is exclusive because of §256(6) of the Federal Judicial Code. See *infra* the text to and following note 107. To the authors the nonapplicability of §23 to this type of case seems, however, questionable and not particularly desirable since it might lead to artificial distinctions—*e.g.*, cases of conversion.

[102] Williams v. Austrian, 67 Sup. Ct. 1443, 1449, dissenting opinion 1456, 1458 (1947).

as much as the mere fact that a cause of action is vested in a trustee in bankruptcy does not make it one "arising under a statute of the United States"[103] and at any rate would not dispense with the requirement of the jurisdictional amount. Probably misled by an erroneous reading of a decision rendered under the Bankruptcy Act of 1867,[104] the Supreme Court had previously intimated in a number of cases[105] that the words "controversies . . . as distinguished from proceedings in bankruptcy" contained in Section 23(a) indicated that Section 2 granted only summary jurisdiction and that all plenary jurisdiction depended upon Section 23. However, in the present case the court reviewed the history of the two sections and came to the conclusion that Section 2 granted full summary and plenary jurisdiction "except as herein otherwise provided,"[106] and that while Section 23 contained such exception for straight bankruptcy and other rehabilitation proceedings no such limitation existed for the reorganization court under Chapter X. Although Justice Frankfurter entered a vigorous dissent, which pointed out that the decision destroyed the desirable distribution of the judicial business under the Bankruptcy Act between the state and federal courts,[107] it is not for us to presume that the court will reverse its position in the near future. Consequently, some of the implications and problems following from the "new view" should be investigated. Of those which we here notice, a few were posed but not answered by the court.

1. In the first place, will the effect of the majority opinion be that the federal courts have *exclusive* jurisdiction over all plenary actions by trustees in reorganization under Chapter X? Although the majority specifically reserved the question, the dissent intimated that this result would have to follow. Section 256 of the Judicial Code vests exclusive jurisdiction in the federal courts "of all matters and proceedings in bankruptcy."[108] This section of the Code was inserted by the revisers of 1874 and employed the terms used in Section 1 of the Bankruptcy Act of 1867.[109] But even at that time it was not considered as settled that the provision of the code made the plenary jurisdiction based upon Section 1 of the 1867 Act exclusive.[110] Under the Bankruptcy Act of 1898 not many, if any, problems could arise,[111] since

[103] See note 68, *supra*.

[104] Lathrop v. Drake, 91 U. S. 516 (1875).

[105] See Bardes v. Hawarden Bank, 178 U. S. 524 (1900); Schumacher v. Beeler, 293 U. S. 367 (1934).

[106] The Court was not troubled by the fact that this interpretation construed §23(a) as if it read "as distinguished from *other* proceedings under this Act."

[107] Justice Frankfurter has consistently warned against any construction increasing the scope of the business of the federal courts. See, *e.g.*, *Ex parte* Peru, 318 U. S. 578, 602 (1943); Busby v. Electric Utilities Union, 323 U. S. 72, 77 (1944).

[108] REV. STAT. §711 (1875), 28 U. S. C. §371 (1940).

[109] Section 1 of the Bankruptcy Act of 1867 provided that the ". . . several district courts of the United States be . . . constituted courts of bankruptcy, and they shall have original jurisdiction . . . in all matters and proceedings in bankruptcy." 14 STAT. 517, §1 (1867).

[110] In Claflin v. Houseman, 93 U. S. 130, 133 (1876) the question was specifically reserved. The lower federal and state courts were fairly well divided on the issue. *See* Clark v. Ewing, 3 Fed. 83 (N. D. Ill. 1880). The argument was apparently not raised in McKenna v. Simpson, 129 U. S. 506 (1888).

[111] See note 101, *supra*.

Section 23 and, after 1903, Sections 60b, 67e and 70e made it clear that the plenary jurisdiction of the federal courts under these sections was concurrent. The revision of 1938 changed the words "bankruptcy proceedings" in Section 2 and "proceedings in bankruptcy" in Section 23 to "proceedings under this act," but no such change was made in the Federal Judicial Code. Even if it should follow[112] that the change in the reading of the word "proceedings" in the Bankruptcy Act should change the meaning of the word "proceedings" used in the Judicial Code in Sections 41(19) and 256(6), it would not mean that federal jurisdiction over plenary actions under Chapter X is exclusive unless the additional and unnecessary assumption were made that the Chandler Act, by substituting "under this act" for "in bankruptcy" in Section 2, made the same change by implication in the Judicial Code. The fact that Section 111 of the Bankruptcy Act provides specifically that the jurisdiction over the assets is conclusive might also strengthen the argument that the in personam jurisdiction of the reorganization court is concurrent.

2. Assuming the jurisdiction to be concurrent, a suit brought in the state court would of course be removable into the federal court provided that the requisite jurisdictional amount and either appropriate diversity of citizenship between the *trustee* and defendant or a question based on a federal statute other than the Bankruptcy Act is present.[113]

3. The plenary jurisdiction of the domiciliary court would not be nationwide merely because of the changed reading of the term "proceeding" in Section 2, since the extraterritorial scope of the protective summary jurisdiction does not follow from the term "proceeding" but from Section 111.[114]

4. The decision will probably have some effect on straight bankruptcy proceedings. In the first place, it lends support to the view that jurisdiction over actions which originate in the person of the trustee may be based on Section 2(7) and brought in the federal court as bankruptcy court[115] without further qualifications unless they are included in the exception of Section 23.[116] In the second place, the decision might possibly affect the construction of Section 24. It has been held that appeals from decisions under Sections 60, 67, and 70 in connection with Section 23b followed the federal rules and not Section 24 because the words "controversies arising in proceedings in bankruptcy" in Section 24 apply only to controversies adjudicated

[112] *Cf.* the dissent of Justice Frankfurter in the *Austrian* case.

[113] See note 68, *supra*. Of course, if the trustee sues the defendant in a court of the state of which the defendant but not the trustee is a citizen, no removal on the basis of diversity is possible although the federal court of that state would have had original jurisdiction since such removal requires that the defendant be a non-resident of the forum. *Cf.* DOBIE, FEDERAL PROCEDURE 365 (1928).

[114] See *supra* Topic C(5).

[115] Under the terminology of the Bankruptcy Act the federal court sits as a "court of bankruptcy" whenever its jurisdiction depends on the Bankruptcy Act and is independent of diversity of citizenship or a question arising under a federal law other than the Bankruptcy Act. While the procedure of the federal court sitting as bankruptcy court in plenary actions is identical with that where it sits on other grounds of federal jurisdiction, its substantive powers might vary. Thus, *see* National Automatic Tool Co. v. Goldie, 27 F. Supp. 399 (D. Minn. 1939).

[116] See note 101, *supra*.

under Section 2 of the Act.[117] Under the new reading of Section 2 it could be argued that the controversies mentioned in the exception clause of Section 23(b) fall within the jurisdiction granted in Section 2 and are therefore appealable under Section 24.[118] The recent change of the period for appeal under the Federal Rules to thirty days[119] will make the question moot except where the judgment involves less than $500.

5. The last point to be mentioned is the question whether the non-domiciliary federal court to which the trustee resorts as bankruptcy court can direct the trustee to sue in the state court if the cause of action depends entirely on state law and other grounds for federal jurisdiction are not present. An affirmative answer would be in line with intimations in Supreme Court cases[120] and would seemingly overcome the chief objections raised by Justice Frankfurter against the results of the *Austrian* case.

In the light of the doubts here suggested it would seem advisable to clarify the proposed revision of the Federal Judicial Code[121] so as to take care of the problems.

II

THE BUSINESS OF THE FEDERAL COURTS UNDER THE BANKRUPTCY ACT

After this consideration of the technical legal aspects of the jurisdiction of federal courts in the administration of the Bankruptcy Act a brief discussion of the major determinations to be made in the various proceedings under the Act seems to be in order.

A. Straight Bankruptcy Proceedings

"Straight bankruptcy" proceedings[122] have a two-fold purpose: to convert the assets of the bankrupt into cash for distribution among the creditors, and also to relieve the honest debtor from the weight of oppressive indebtedness and permit him

[117] Lowenstein v. Reikes, 54 F.2d 481 (C. C. A. 2d 1931); Exchange Nat. Bank v. Meikle, 61 F.2d 176 (C. C. A. 9th 1932); In Matter of Finkelstein, 102 F.2d 688 (C. C. A. 2d 1939); 2 COLLIER, BANKRUPTCY §24.10 (14th ed., Moore-Oglebay, 1940).

[118] It could, however, still be argued that §24 does not apply to all adjudications under §2 but only to those rendered in summary proceedings, although there is apparently no direct authority to support this view.

[119] See the amendment to Rule 73, to be effective three months after the adjournment of the first regular session of the Eightieth Congress.

[120] See *supra* note 65 and text. One writer has recently taken the position that the federal courts cannot abdicate jurisdiction which has been conferred exclusively on them by Congress. Coleman, *The Effect of the Presence of a State Law Question on the Exercise of Federal Jurisdiction*, 5 NAT. BAR. J. 257, 267 (1947). But might it not be said that the bankruptcy court, in ordering the trustee to sue in the state court, is not abdicating exclusively conferred jurisdiction but is only exercising its supervisory power over the trustee as an officer of the court? This reasoning, of course, would not deprive defendant of his right to remove within the limits pointed out in note 113.

[121] In its proposed form, §1334 provides: "The district courts shall have original jurisdiction, exclusive of the courts of the states, of all matters and proceedings in bankruptcy." See H. R. Doc. No. 7124, 79th Cong., 2d Sess. (1946). This wording will probably increase the difficulties foreseen by Justice Frankfurter.

[122] The term "straight bankruptcy" is used by Justice Douglas in Emil v. Hanley, 318 U. S. 515, 517 (1943).

to start afresh, free from the obligations consequent upon business misfortunes.[123] The proceedings commence with a petition by the bankrupt[124] or his creditors.[125] An involuntary petition must be predicated upon one of the six specifically enumerated and defined acts of bankruptcy.[126] If the prerequisite conditions are fulfilled the adjudication of the debtor as a bankrupt follows.[127] Except in non-asset cases begun by voluntary petition,[128] a trustee is appointed[129] for the collection of the non-exempt estate and its conversion into cash.[130] The adjudication of any person except a corporation has the effect of a petition for discharge[131] which is granted unless the debtor has committed one of a number of specifically listed acts which exclude this privilege.[132] The discharge prevents the enforcement[133] of all debts which are provable in bankruptcy and do not belong to certain classes which are exempt from discharge.[134] Generally the dischargeability of a specific debt is decided by the court in which the enforcement proceeding is pending upon the appropriate plea[135] and not by the bankruptcy court. In certain circumstances, however, the bankruptcy court might have to decide the question.[136]

[123] Maynard v. Elliott, 283 U. S. 273, 277 (1931). The purpose of bankruptcy to help the poor but unfortunate debtor through the privilege of discharge is a comparatively recent development. The discharge provisions have been progressively liberalized and the scope of provable and therefore dischargeable debts constantly increased. See Riesenfeld, *The Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401, 406, 407 (1947); 3 COLLIER, BANKRUPTCY §63.03 (14th ed., Moore-Oglebay, 1941). The discharge is, of course, the incentive for voluntary petitions which greatly outnumber the involuntary petitions. Thus, for the fiscal year ending June 30, 1946, there were about 8,300 voluntary petitions in bankruptcy and 260 involuntary. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 142 (1946).

[124] Bankruptcy Act §59(a) in conjunction with §4(a) (defining persons who may become volunary bankrupts).

[125] *Id.*, §59(b) in conjunction with §4(b) (defining the persons who can become involunary bankrupts).

[126] *Id.*, §3(a) (1-6). The system has been bitterly criticized as medieval and clumsy by Professor Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189 (1938); but see Riesenfeld, *Evolution of Modern Bankruptcy Law*, 31 MINN. L. REV. 401, 414 (1947). Acts of bankruptcy must be carefully and separately pleaded; defects can be cured only within certain limits. *Cf.* 2 COLLIER, BANKRUPTCY §18.26 (14th ed., Moore-Oglebay, 1940); *In re* De Luxe Oil Co., 36 F. Supp. 287 (D. Minn. 1940).

[127] *Id.*, §18(d), (e), (f) and (g).

[128] General Order 15.

[129] Bankruptcy Act, §44.

[130] *Id.*, §47.

[131] *Id.*, §14(a).

[132] *Id.*, §14(c) (1-7).

[133] The precise legal effect of a discharge is the subject of much discussion. To a large extent it is a federal question although beyond that state law becomes operative. *See* Zavelo v. Reeves, 227 U. S. 625 (1913); Local Loan Co. v. Hunt, 292 U. S. 234 (1934). Thus, state law may permit assignment of a discharged cause of action and consider it as sufficient consideration for a new promise, Stanek v. White, 172 Minn. 390, 215 N. W. 784 (1927); Comment, 31 MINN. L. REV. 391 (1947), or the entry of a judgment in personam with the execution permanently stayed for the purpose of enforcing the lien under an attachment or garnishment as long as the latter itself is not affected by bankruptcy. See Mussman and Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1, 68 *ff.* (1942).

[134] Bankruptcy Act, §17(a) (1-6).

[135] If the discharge is obtained before judgment, the discharge is pleaded in bar by the defendant bankrupt; if the discharge was obtained after judgment, a petition to stay the enforcement or to enter a satisfaction on the record is made. See Comment, 25 MINN. L. REV. 790 (1941).

[136] The bankruptcy court may except certain debts from the discharge, viz., debts which had been scheduled in a prior proceeding in which a discharge was denied. See Comment, 31 MINN. L. REV. 491 (1947). The bankruptcy court may stay pending suits against the bankrupt on claims which are dischargeable until the question of his discharge is determined. Apparently the permissible and more

The collection and distribution of assets presents two major phases, viz. the collection of the assets and proof and allowance of claims or adjudication of interventions for reclamation purposes. The bankrupt estate is composed of all non-exempt assets of the bankrupt,[137] title to which vests in the trustee as of the date of the petition.[138] But the rights of the trustee go beyond his position as universal successor of the bankrupt. Because of his capacity as representative of the creditors, he may avoid certain transactions which are valid as against the debtor himself. These transactions are "preferential transfers" as defined in the Bankruptcy Act,[139] judicial liens obtained within four months prior to the filing of the petition while the debtor was insolvent,[140] fraudulent conveyances as defined by the Bankruptcy Act itself,[141] and fraudulent or otherwise voidable conveyances under state law.[142] In order to avail himself of all rights given by state law to creditors, the trustee is also by specific provision of the Act placed in the position of a creditor armed with process.[143] Liens which are not voidable on one of these grounds survive bankruptcy, although no judicial enforcement proceedings outside of the bankruptcy court may be begun after the petition has been filed.[144] All assets in the actual or constructive possession of the bankrupt are within the summary jurisdiction of the bankruptcy court,[145] and title or other interests in them must be asserted in the bankruptcy court through summary reclamation proceedings or by other petitions in the nature of interventions.[146] The proof and allowance of provable[147] claims and determination of their priority[148] follows a fairly informal procedure in the bank-

desirable practice is to petition the court in which the action is pending before resorting to the bankruptcy court. See Connell v. Walker, 291 U. S. 1, 5 (1934); 1 COLLIER, BANKRUPTCY §11.08 (14th ed., Moore-Mulder 1940). Beyond these cases, the bankruptcy court will intervene only in exceptional instances to vindicate a discharge. See Comment, 25 MINN. L. REV. 790 (1941); Glenn, *Effect of Discharge in Bankruptcy: Ancillary Jurisdiction of Federal Court*, 30 VA. L. REV. 531 (1944).

[137] Bankruptcy Act, §§6, 70(a), construed in Myers v. Matley, 318 U. S. 622 (1943).

[138] *Id.*, §70(a). Suits begun by the bankrupt before the filing of the petition are not terminated because of the filing of the petition, but the trustee has under §11(c) the threefold choice of (1) starting a new suit and abating the old one, (2) intervening in the old one, or (3) letting the bankrupt continue although the results conclude the trustee. Meyer v. Fleming, 327 U. S. 161, 165 (1946). Bona fide purchasers from the bankrupt are protected under Sections 21(g) and 70(d).

[139] *Id.*, §60 in connection with §1(30).

[140] *Id.*, §67(a). For details see Mussman and Riesenfeld, *Garnishment and Bankruptcy*, 27 MINN. L. REV. 1 (1942); Fischer v. Pauline Oil Co., 309 U. S. 294 (1940).

[141] *Id.*, §67(d).

[142] *Id.*, §70(c) and (e).

[143] *Id.*, §70(c). The rights do not depend on the actual existence of a creditor. Where state law attributes to a lien creditor the rights of a bona fide purchaser, the trustee enjoys apparently the same rights regardless of whether chattels or land is involved. See Comment, 25 MINN. L. REV. 514 (1941). But otherwise the trustee is neither a bona fide purchaser, Glenn, *The Chandler Act and the Trustee as a Bona Fide Purchaser*, 25 VA. L. REV. 885 (1939), nor a purchaser at a judicial sale. Myers v. Matley, 318 U. S. 622 (1943).

[144] Isaacs v. Hobbs Tie & T. Co. 282 U. S. 734 (1931). If enforcement has begun, the proceedings whether legal or equitable will not be superseded. Straton v. New, 283 U. S. 318 (1931); Emil v. Hanley, 318 U. S. 515 (1943).

[145] See note 71, *supra*, and text.

[146] See 2 COLLIER, BANKRUPTCY §§23.11 24.31 (14th ed., Moore-Oglebay, 1940), id., §57.07.

[147] See the catalogue in §63, Bankruptcy Act.

[148] Bankruptcy Act, §64.

ruptcy court.[149] From time to time dividends are declared and distributed.[150] After all available assets are collected and their proceeds distributed the proceedings are closed.[151]

B. Railroad Reorganization Proceedings under Section 77

This section was added to the Act in 1933 to eliminate difficulties which had arisen under the old "umbrella" receiverships, although this paternity has left its marks on the powers and jurisdiction of the court. The present form of the statute is chiefly due to a revision of 1935.[152]

The proceedings are initiated by either involuntary or voluntary petition which has to be approved by the court.[153] Upon approval, a trustee is appointed subject to ratification by the Interstate Commerce Commission.[154] The trustee possesses all the powers of a trustee in bankruptcy, and, if authorized by the judge, of a chancery receiver,[155] but in contrast to the latter is vested with title.[156]

According to Section 77(l) the jurisdiction and powers of the court, the duties of the debtor, and the rights and liabilities of creditors, and of all persons, with respect to the debtor and its property are the same as in straight bankruptcy in so far as such a construction is consistent with other provisions of the section. However, there are a number of important differences from the ordinary bankruptcy proceedings, differences which follow directly from the contrasting purpose of the reorganization proceedings, viz. rehabilitation instead of liquidation. To transform the embarrassed enterprise into a going concern with a sound capital structure, all creditors, secured and unsecured, as well as the stockholders must be brought within the sweep of the plan and the control over the assets must be tightened.

As in straight bankruptcy, the reorganization court obtains exclusive jurisdiction over all the assets of the debtor in its actual or constructive possession, wherever located. Although the statute predicates this jurisdiction upon the approval of the petition[157] and does not contain an exception relating to property held adversely, it is now recognized that the date of filing controls and that property held adversely under a claim of title is not under the full sweep of the summary powers.[158] However, in the details there are significant changes. The proceedings supersede or affect proceedings pending in other courts which straight bankruptcy proceedings would leave untouched. Thus, state and federal receivers "of all or any part of the property

[150] See *id.*, §§65(a) and (b), 47(a)(11). [151] *Id.*, §§47(13) and (14), 55(e), 2(a) (8).

[149] *Id.*, §57. The substantive rules determining the provability and allowability of claims are basically principles of federal law and equity. "For nothing decided in Erie Ry. v. Tompkins . . . requires a court of bankruptcy, in applying the statutes of the United States governing the liquidation of bankrupt estates, to adopt local rules of law in determining what claims are provable, or to be allowed, or how the bankrupt's estate is to be distributed among claimants." Heiser v. Woodruff, 327 U. S. 726, 732 (1945). See also Vanston Bondholders Prot. Com. v. Green, 67 Sup. Ct. 237 (1946).

[152] See 5 COLLIER, BANKRUPTCY §§77.01, 77.02 (14th ed., Stephenson-Seligson, 1943).

[153] Bankruptcy Act, §77(a). [154] *Id.*, §77(c)(1).

[155] *Id.*, §77(c)(2). [156] *Ibid.* [157] *Id.*, §77(a).

[158] See the dictum in Meyer v. Fleming, 327 U. S. 161, 164 (1946). The case is also noteworthy for its holding that the passage of title to the trustee did not abate actions commenced by a stockholder of the debtor in a stockholder's suit.

of a debtor" appointed under other proceedings are displaced in favor of the reorganization trustee regardless of the time of their appointment.[159] The reorganization court can stay pending proceedings for the enforcement of a lien[160] and can even by summary process enjoin the non-judicial enforcement of collateral in the hands of the secured creditors.[161] The reorganization court has larger powers to stay in personam suits against the debtor than the bankruptcy court.[162] It may, in the exercise of its sound discretion, stay any suit, whether pending at the time of the petition or not, particularly if the result of the suit would be a burden on the estate. The mere fact that a jury verdict might result in a larger recovery is not a sufficient ground for a stay[163] although such judgment would apparently be conclusive if filed for proof.[164] This result is contrary to the rule which seems to be conceded for straight bankruptcy[165] but in line with that announced by the Supreme Court for the old "umbrella" receiverships[166] and recently affirmed under the full faith and credit clause for state receiverships, at least for suits commenced prior to the appointment of the receiver.[167] Since the straight bankruptcy rules for provability and dischargeability do not control in reorganization proceedings,[168] it is not inconsistent to assume that different principles for the conclusive effect of post-petition judgments against the debtor apply in such proceedings. Furthermore, it should be noted that Section 77 expressly provides that "suits or claims for damages caused by the operation of trains . . . may be filed and prosecuted to judgment in any court of competent jurisdiction."[169] According to its terms, the provision seems to cover suits for pre-petition damages which are commenced or prosecuted after the petition and against the *debtor*,[170] and it would follow that such judgments are conclusive for proof and allowance.[171] In the converse situation, where the reorganization court has decided upon the existence and amount of a claim, the result cannot be questioned after the discharge and the return of full control to the debtor.[172]

[159] Bankruptcy Act, §77(i). Apparently receivers appointed in foreclosure and cognate suits are not "receivers of any part of the corporate property" within the meaning of this section. *Cf.* Duparquet v. Evans, 297 U. S. 216, 222 (1936).

[160] *Id.*, §77(j).

[161] Continental Bank v. Rock Island Ry., 294 U. S. 648, 675 (1935).

[162] Bankruptcy Act, §77(j).

[163] Foust v. Munson S. S. Lines, 299 U. S. 77 (1936). A reorganization court under §77B should not enjoin the prosecution of a damage claim against the debtor in a state court if plaintiff needs the judgment for recovery on an insurance policy.

[164] This follows from the reasoning of the court in the *Munson* case which implies that the court felt that the judgment could be presented as conclusive proof for allowance. But *contra*, as to the conclusive effect of such judgment in proceedings under Chapter X, except where the trustee has been made a party with the consent of the court, is 6 COLLIER, BANKRUPTCY §9.06 (14th ed., Moore-Oglebay, 1947), and apparently Matter of Paramount Publix Corp., 85 F.2d 42 (C. C. A. 2d 1936).

[165] See note 43, *supra*.

[166] Riehle v. Margolies, 279 U. S. 218 (1929).

[167] Morris v. Jones, 67 Sup. Ct. 451 (1947). For a critical comment, see Harper, *The Supreme Court and the Conflict of Laws*, 47 COL. L. REV. 883, 884*ff*. (1947).

[168] Bankruptcy Act, §77(b). See 5 COLLIER, BANKRUPTCY §77.20 (14th ed., Stephenson-Seligson, 1943).

[169] *Id.*, §77(j).

[170] See Robinson v. Trustees, 318 Mass. 121, 60 N. E. 2d 593 (1945).

[171] *In re* Chicago & E. I. Ry., 121 F.2d 785 (C. C. A. 7th 1941).

[172] This result would follow from the discharge provision of §77(f) regardless of the res judicata effect of the decision by the reorganization court. See note 43, *supra*, and text.

Great confusion exists with respect to suits against the trustee. It is now settled that because of Section 66 of the Judicial Code the trustee can be sued without leave from the reorganization court "in respect of any act or transaction of his in carrying on the business" as long as the exclusive in rem jurisdiction of the reorganization court is not interfered with.[173] It is arguable that additional suability follows apparently from Section 77(j) with respect to damages resulting from the operation of trains regardless of whether or not the cause of action arose prior to the trustee's appointment.[174] Jurisdiction over such an action against the trustee follows the general principles. Federal jurisdiction, accordingly, depends either on the presence of a separate federal question apart from the pendency of reorganization proceedings and the appointment of the trustee or on the diversity of citizenship between the trustee and the plaintiff.[175] The venue is regulated by Section 51 of the Judicial Code. It should be noted, however, that this section is satisfied by "the designation by a foreign corporation of an agent for service of process in conformity with the law of the state in which suit is brought against it in one of the federal courts for that state,"[176] and that "the effect of Section 66 is to place the trustee operating the road upon the same plane with railroad companies as respects the mode of service."[177] Consequently, if the requisite conditions of federal jurisdiction are present the trustee may be sued in any federal court in which the railroad could have been sued through service on the appropriate agent.[178] State venue statutes are of no effect in this connection.[179]

The most important stage of the proceedings is, of course, the adoption of the reorganization plan. It proceeds in several steps.[180] The plan as evolved under the guidance of the Interstate Commerce Commission is approved by it and certified to the court. The court hears objections and approves the plan if satisfied that it is equitable and fair and in compliance with other provisions of the statute. The plan is then submitted for a vote to the various materially affected classes of stockholders

[173] Thompson v. Texas Mexican Ry., 66 Sup. Ct. 937 (1946).

[174] See the dicta in *In re* Chicago & E. I. Ry., 121 F.2d 785 (C. C. A. 7th 1941). But *contra* is Robinson v. Trustees, *supra* note 170, which holds §77(j) inapplicable to suits against the trustee for pre-reorganization damages.

[175] Section 23 of the Act, even if applicable to railroad reorganizations, would not compel a different result in respect to claims against the trustee of the kind envisaged by §66 of the Judicial Code or §77(j) of the Bankruptcy Act.

[176] Neirbo Co. v. Bethlehem Corp., 308 U. S. 165 (1939).

[177] Eddy v. Lafayette, 163 U. S. 456, 464 (1896).

[178] Jacobowitz v. Thomson, 141 F.2d 72 (C. C. A. 2d, 1944). The view of Judge Caffey in Dugan v. Gardner, 68 F. Supp. 709 (S. D. N. Y. 1946) that only a resident plaintiff may sue under such circumstances seems to miscontrue the combined effect of the two Supreme Court cases cited in notes 176 and 177, *supra*.

[179] *Cf.* 1 MOORE'S FEDERAL PRACTICE §2.07 (1938). Obviously Chapman v. St. Louis & S. W. Ry., 71 F. Supp. 1017 (N. D. Tex. 1947), misconceived this rule and also erred in invoking Rule 17 of the Federal Rules of Civil Procedure for suits against receivers. The recent amendment to Rule 17 expressly excludes receivers.

[180] Bankruptcy Act, §77(e).

and creditors whose claims have been allowed, and, if accepted by the requisite majorities, is confirmed by the court.[181]

C. Corporate Reorganization under Chapter X

The functions and jurisdiction of the court in the reorganization of business corporations under Chapter X are very similar to those in railroad reorganizations. As a consequence, cases decided under Section 77 constitute, within limits, precedents for the reorganization courts under Chapter X and vice versa.[182] The chief difference concerning jurisdiction is the express provision for the inapplicability of Section 23, the effect of which has been discussed above.[183]

The proceedings are initiated by a voluntary or involuntary petition[184] which must be approved by the court[185] and which vests in the reorganization court exclusive summary jurisdiction over all the debtor's assets which are not held adversely under claim of title.[186] From the date of the filing the court possesses ample protective powers and may temporarily stay not only prior pending bankruptcy, receivership, or mortgage foreclosure proceedings but also other suits against the debtor if they tend to hamper the administration.[187] The subsequent approval of the petition automatically stays a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding and any act or other proceeding to enforce a lien against the debtor's property.[188] The reorganization trustee[189] or debtor in possession[190] is entitled to obtain possession from such trustee or receiver, including foreclosure receivers, by turnover order if necessary and regardless of the four-months rule applicable in straight bankruptcy.[191]

Suits in personam against the debtor may be commenced[192] or prosecuted even after the approval of the petition so long as they do not hamper the administration

[181] On the functions of the court in these steps, see R. F. C. v. Denver & R. G. W. R. R., 66 Sup. Ct. 1282 (1946). On the permissible terms of a plan *see also* Ecker v. Western Pacific R. R., 318 U. S. 448 (1943); Group of Investors v. Milwaukee R. R., 318 U. S. 523 (1943). For a detailed and illuminating study, see Swaine, *A Decade of Railroad Reorganization under Section 77 of the Federal Bankruptcy Act*, 56 HARV. L. REV. 1037, 1193 (1943).

[182] *Cf.* 6 COLLIER, BANKRUPTCY §0.13 (14th ed., Moore-Oglebay, 1947).

[183] See the discussion *supra* under I-D.

[184] Bankruptcy Act, §126 *ff.*

[185] *Id.*, §141 *ff.*

[186] *Id.*, §111. Assets which are held under an undisputed claim of a mere security interest are apparently under the summary jurisdiction of the court. See 6 COLLIER, BANKRUPTCY §§3.05, 14.03[2].

[187] *Id.*, §113. For a construction of the portion of this section which relates to bankruptcy, see Duggan v. Sansberry, 327 U. S. 499 (1946). For limitations applying to stays of in personam suits see Foust v. Munson S. S. Lines, 299 U. S. 77 (1936), discussed *supra*, notes 163 and 164 and text.

[188] Bankruptcy Act, §116.

[189] Appointment is mandatory if the liquidated debts exceed $250,000. *Id.*, §156.

[190] A debtor in possession is vested with the rights and subject to the duties of a reorganization trustee. *Id.*, §188.

[191] *Id.*, §257. *Cf.* Emil v. Hanley, 318 U. S. 515, 522 (1942), recognizing that §2(a)(21) authorizes turnover orders in these cases.

[192] The commencement of suits for pre-reorganization claims against the debtor after the appointment of a trustee may raise serious problems as to venue and service in as much as the corporation no longer operates the road. See the discussion on this point in Dugan v. Gardner, 68 F. Supp. 709 (S. D. N. Y. 1946).

or affect title, and the judgments obtained are provable[193] and apparently conclusive against the estate[194] and are discharged by the approval of the plan.[195] The trustee or the debtor in possession may be sued for acts of their administration within the limits of Section 66 of the Judicial Code.[196] Federal jurisdiction and venue follow the principles discussed above in connection with railroad reorganization.[197]

Approval[198] and confirmation[199] of the plan follow a procedure analogous to that in railroad reorganization with the exception that the Securities and Exchange Commission is the administrative agency to be consulted.[200]

D. Arrangements under Chapter XI

Arrangement proceedings are the offspring of the old compositions and extensions which have a long and involved history in Anglo-American law.[201] They are designed to rehabilitate small and middle-sized businesses.[202] Large corporations with securities held by the public at large are normally not entitled to resort to the summary procedure of this chapter,[203] which leads only to an extension or scaling-down of unsecured debts.[204]

The procedure is initiated by voluntary petition outside of or during bankruptcy.[205] Upon the filing of the petition the arrangement court acquires exclusive jurisdiction of the debtor and his property, wherever located, except where inconsistent with the other provisions of the Act.[206] It has been held that the jurisdiction thus acquired extends to property subject to security interests, although they are not affected by the plan.[207] In addition it is expressly provided that the court may stay any act or the commencement or continuation of any proceeding to enforce any lien upon the property of the debtor, upon notice and for cause shown.[208] The court may further enjoin or stay the commencement or continuation of other suits,[209] which is important if such suit might, for instance, result in the loss by the debtor of his major source of payment.[210]

If the plan effects a mere extension, all existing unsecured claims are provable,[211] but if a settlement or satisfaction is sought the ordinary bankruptcy rules of provabil-

[193] See Bankruptcy Act, §196 in conjunction with §106(4).
[194] *Contra,* 6 COLLIER, BANKRUPTCY §9.06. *But see* the discussion *supra,* notes 163 and 164 and text.
[195] Bankruptcy Act, §§224(1), 228(1).
[196] The debtor in possession has been held to come within the purview of §66. See 6 COLLIER, BANKRUPTCY, §§3.30[2], 8.16.
[197] See *supra,* notes 176-179 and text.
[198] Bankruptcy Act, §§174, 216 *ff.*
[199] *Id.,* §221 *ff.*
[200] *Id.,* §172.
[201] See Riesenfeld, *The Evolution of Modern Bankruptcy Law,* 31 MINN. L. REV. 401 (1947).
[202] S. E. C. v. U. S. Realty & Improvement Co., 310 U. S. 434, 450 (1940). For an excellent clinical analysis of arrangements under Chapter XI, see Comment, 51 YALE L. J. 253 (1942).
[203] *Ibid.*
[204] Bankruptcy Act, §§356, 371.
[205] *Id.,* §§321, 322.
[206] *Id.,* §311.
[207] Lockhart v. Garden City Bank & Trust Co., 116 F.2d 658 (C. C. A. 2d 1940).
[208] Bankruptcy Act, §314 (second clause).
[209] *Id.,* §314 (first clause).
[210] Application of Reich, 146 F.2d 162 (C. C. A. 2d 1944).
[211] Bankruptcy Act, §307.

ity apply.[212] If the plan is accepted by the requisite majority and confirmed by the court,[213] it is binding upon all creditors[214] and constitutes a discharge of all dischargeable debts provided for in the arrangement.[215] The court retains jurisdiction if the arrangement so provides until its provisions are performed.[216] If the debtor defaults he may be adjudicated a bankrupt or the suspended bankruptcy proceedings continued.[217] The status in this bankruptcy of claims which have arisen after the confirmation has created grave doubts.[218]

E. Agricultural Compositions and Extensions under Section 75

The Bankruptcy Act incorporates special provisions for the relief of farmers unable to meet their debts as they mature and desiring to effect a composition or an extension of time.[219] The applicability of the section was limited for a definite period and the petitions under the section had to be filed prior to March 31, 1947.[220] The proceedings consisted, if necessary, of two stages, viz., the attempt to obtain a workable rehabilitation arrangement,[221] and, in case of failure, an adjudication as bankrupt with a particular statutory right to rehabilitate himself.[222] The provisions of the act caused a number of doubts and uncertainties,[223] but since only a relatively small number of cases are still to be processed[224] no discussion in this study seems to be in order.

F. Wage Earners' Plans under Chapter XIII[225]

The provisions of this chapter permit an individual who is a "wage earner,"[226] whether in bankruptcy[227] or not,[228] to file a petition in the appropriate bankruptcy

[212] *Id.*, §352; see 8 COLLIER, BANKRUPTCY §7.05 (14th ed., Stephenson-Seligson, 1941). Because of the fact that bankruptcy rules of proof and allowance apply, it would seem that judgments obtained against the debtor after the filing of the petition are not conclusive in the arrangement proceedings.

[213] Bankruptcy Act, §361 *ff.*

[214] *Id.*, §367. Note that the definition of creditors in §307 applies only to mere extension arrangements.

[215] *Id.*, §371.

[216] Bankruptcy Act, §§368, 357(7).

[217] *Id.*, §377.

[218] See 8 COLLIER, BANKRUPTCY §10.12 (14th ed., Stephenson-Seligson, 1941); *In re* Plymack, 5 AM. B. R. (N.S.) 818 (1941).

[219] Bankruptcy Act, §75. For the definition of a "farmer" for the purposes of this section, see Benitez v. Bank, 313 U. S. 270 (1941).

[220] *Id.*, §75(c), as amended by Act of June 3, 1946, c. 280, 60 STAT. 230 (1946).

[221] *Id.* §75(a-r).

[222] *Id.*, §75(s).

[223] See Diamond and Letzler, *The New Frazier-Lemke Act*, 37 COL. L. REV. 1092 (1937); 5 COLLIER, BANKRUPTCY §75.01 *ff.* (14th ed., Stephenson-Seligon, 1943).

[224] On June 30, 1946, 1,540 proceedings were pending, with only 122 new petitions during the fiscal year ending on that date. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 130 (1946). For the proposals of a permanent chapter for farmers, see Note, 56 YALE L. J. 982 (1947).

[225] For a history of the legislation, see Woodbridge, *Wage Earners' Plans in the Federal Courts*, 26 MINN. L. REV. 775 (1942).

[226] A "wage earner" according to §606(8) is "an individual who works for wages, salary or hire at a rate of compensation which, when added to all his other income, does not exceed $3000 a year."

[227] Bankruptcy Act, §621. The bankruptcy proceedings are automatically stayed by the filing of the petition. *Id.*, §625.

[228] *Id.*, §622.

court stating that he is insolvent and desires to effect either a composition or an extension of time[229] for the payment of his debts.[230] The jurisdiction of the court over the debtor, his property wherever located, and his wages or earnings during the period of consummation of the plan attaches as of the date of filing,[231] and the court is given power to stay the commencement or continuation of in personam suits and on cause shown to enjoin any act or the commencement or continuation of any proceedings to enforce any lien on the debtor's property.[232] The plan is presented by the debtor and must deal generally with unsecured debts[233] and may deal severally with secured debts.[234] Upon appropriate approval by the creditors,[235] the court must confirm the plan if satisfied in certain specified respects.[236] Upon acceptance, a trustee is appointed for the purpose of receiving the periodic payment of wages and supervising the execution of the plan.[237] During the period of extension, the court is given the power necessary to effect the consummation of the plan,[238] and, upon its completion, the court orders a discharge which is effective as against all claims which would be dischargeable in straight bankruptcy if the creditor did not accept the plan (but regardless of whether he participated).[239]

Most of the problems which would seem to arise in this chapter are still without judicial answer. For example, it is provided in Sections 60 and 67 that preferential transfers and certain judicial liens and fraudulent conveyances are void under Chapter XIII proceedings. Apparently the debtor himself can set these aside.[240] Furthermore, there is no provision for creditors who acquire claims during the extension of the plan, a result which not only tends to defeat the purpose of the act[241] but also imposes a severe burden of inquiry on prospective creditors. In spite of difficulties, the chapter has received general acclaim.[242]

[229] On the distinction between "compositions" and "extensions" for the purpose of determining dischargeability under §14(c)(5), *see In re* Thompson, 51 F. Supp. 12 (W. D. Va. 1943).

[230] Bankruptcy Act, §§606(6), 623. The petition must be made in good faith. *See* Hill v. Topeka Morris Plan Co., 105 F.2d 299 (C. C. A. 10th 1939).

[231] *Id.*, §§611, 612.

[232] *Id.*, §614.

[233] *Id.*, §646(1). Other mandatory provisions are set out in Subsections (4) and (5).

[234] *Id.*, §646(2).

[235] *Id.*, §§633 (3-5), 651, 652.

[236] *Id.*, §656(a).

[237] *Id.*, §633(4). The trustee under Chapter XIII is merely a custodian. See Woodbridge, *supra* note 225, at 784.

[238] *Id.*, §658. This power prevents a garnishment or an assignment of wages during this period. See Woodbridge, *supra* note 225, at 792.

[239] *Id.*, §§660, 661; 9 COLLIER, BANKRUPTCY §29.10 (14th ed., Stephenson-Seligson, 1942).

[240] *Cf.* 8 COLLIER, BANKRUPTCY §6.32 (14th ed., Stephenson-Seligson, 1942); *In re* Martin Corp., 108 F. 2d 172 (C. C. A. 2d 1939).

[241] See Bundschu, *Administration of Wage Earners' Plans in the Bankruptcy Court*, 18 J. N. A. REF. BANKR. 55 (1944).

[242] See Woodbridge, *supra* note 225; Bundschu, *supra* note 241; Allgood, *Wage Earners' Petitions under Chapter XIII*, 46 COM. L. J. 17 (1941); Note, 8 U. OF CHI. L. REV. 106 (1940).

III

CONCLUSION

The foregoing discussion shows that the Bankruptcy Act supplies a considerable and difficult portion of the work of the federal courts.[243] The statistical data, although excellent, do not indicate the civil suits which are tried by the federal court as plenary actions, but which either involve the application of the Bankruptcy Act or at least arise out of bankruptcy.

The problem of jurisdiction under the Bankruptcy Act presents intricate and troublesome questions. While a number are intrinsically interwoven with the substantive bankruptcy law, others are occasioned by the fact that the Federal Judicial Code and the Bankruptcy Act have not kept step. The proposed revision of the Judicial Code should clarify the situation and at least prevent unnecessary litigation on jurisdictional points.

[243] For a detailed analysis of all proceedings under the Bankruptcy Act for the fiscal year ending June 30, 1946, see ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 128-189 (1946). The total of petitions filed—10,196—represents an all-time low. *Id.* at 70. Of these, 122 were under §75, 54 under Chapter X, 79 under Chapter XI, 1,371 under Chapter XIII and 8,561 under straight bankruptcy. *Id.*, at 130. Of the cases concluded during this fiscal year, totaling 11,788, 8,473 were no-asset cases. *Id.*, at 150.

For a chronological comparison of the work of the federal courts in bankruptcy, civil, and criminal matters as measured by the cases commenced, compare the graphs, *id.*, at 54, 60, 70.

THE JURISDICTION OF FEDERAL COURTS IN LABOR DISPUTES

RAY FORRESTER*

I

The jurisdiction of the federal courts in labor disputes furnishes an interesting opportunity for study of the role to which the courts are assigned by Congress in the handling of a specific national problem. In this case, of course, the problem is an unusually difficult and troublesome one. This jurisdiction is of further interest as a case study of the consistency of present-day practices with original constitutional intent concerning, and the historical development of, the role of the federal judiciary in the national scene. State and federal relations are, of course, in issue.

Emotion, expediency, legislative improvisation, political maneuvering, conflicting economic forces, governmental planning, and the role of the federal judiciary in such planning are all involved in this laboratory specimen of the federal judiciary in action.

Current legislation is of special interest in this connection.

II

For many years the policy of the national government was directed toward removing the federal judicial system as a restraining influence on trade-union activity. The policy was specifically expressed in 1914 when Congress declared that "nothing contained in the antitrust laws shall be construed to . . . forbid or restrain individual members of [labor] organizations from lawfully carrying out the legitimate objects thereof; . . ."[1] It was reaffirmed in 1932 with the enactment of the Norris-LaGuardia Act, restricting the jurisdiction of federal courts in the issuance of injunctions in labor cases.[2]

This policy was followed, in general, by state governments as well.

Parallel with this development, both the state and the federal governments evidenced increasing willingness to refer labor disputes to special boards and agencies, such as the National Labor Relations Board and comparable state boards and commissions. While the National Labor Relations Board was granted jurisdiction designed to strengthen labor unions, it was not unusual for state agencies to exercise restraining power as well.[3]

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[1] 38 STAT. 731 (1914), 15 U. S. C. §17 (1940).

[2] 47 STAT. 70 (1932), 29 U. S. C. §101 (1940).

[3] Wisconsin, a pioneer in labor legislation, enacted such a law in the Wisconsin Employment Peace Act of 1939. WIS. STATS. §§111.01-111.19. For a comparison with the Wagner Act, see Lampert, *The Wisconsin Employment Peace Act*, 1946 WIS. L. REV. 193.

This inclination to remove the courts as agencies for the regulation of union activity was justified by its exponents on several grounds. It was said that the judges were inclined to be overly generous in the use of the injunction in labor disputes. Labor consistently expressed a far greater fear of trial by judges than trial by battle; and with the growth of government sympathetic to labor, management has assumed corresponding apprehensions. Proposals for compulsory arbitration as a panacea for disastrous labor-management stalemates have consistently fallen, by mutual consent, before the eternal problem of finding the impartial arbitrator in the judicial system or elsewhere.[4]

Opponents of judicial control contended, also, that the problems of labor and management were *sui generis* in the judicial sense, calling for judgments of policy and determinations of problems outside the experience and training of the average judge and beyond the customary boundaries of the judicial function. There was, in part, a suggestion that labor questions were political questions and therefore subject to political rather than judicial determination. And there was, in part, the growing prestige of *expertise* in the determination of special or technical problems, whereby jurisdiction was taken from the judicial jack-of-all-problems and given to the judicial specialist—with the name of commissioner or administrator. Furthermore, the constant fear of over-burdening the federal judiciary with the multiplying problems of a complex and growing society made itself felt.

It is interesting to note, however, that in the same period Congress, particularly on one occasion, indicated willingness to grant broad jurisdiction to the federal courts in aid of labor. In the Fair Labor Standards Act of 1938 it is provided that an employee may sue to recover unpaid minimum wages or unpaid overtime compensation "in any court of competent jurisdiction . . ."[5] This provision is read by the courts in conjunction with Section 41(8) of the Judicial Code[6] to give the federal courts broad jurisdiction in such cases.[7] A reference will be made later to the validity of this jurisdiction.

During the period which may be broadly described as that of World War II, Congress underwent a gradual but definite shift in its approach to labor and management relations. Turing from a program designed to favor and bolster the growth of trade unions, it indicated in one legislative enactment and then another[8]

[4] See the comments in this regard in the minority report from the Committee on Education and Labor on the Labor-Management Relations Act, 1947. H. R. REP. No. 245, 80th Cong., 1st Sess. 102 (1947).

[5] 52 STAT. 1069 (1938), 29 U. S. C. §216(b) (1940).

[6] This subsection provides that the federal district courts shall have original jurisdiction "of all suits and proceedings arising under any law regulating commerce." 36 STAT. 1092 (1911), 38 STAT. 219 (1913), 28 U. S. C. §41(8) (1940). The use of the words "arising under" herein should be noted with reference to the discussion which is to follow.

[7] Williams v. Terminal Co., 315 U. S. 386, 390 (1942); Fleming v. Wood-Fruitticher Grocery Co., 37 F. Supp. 947, 948 (1941); Robertson v. Argus Hosiery Mills, 32 F. Supp. 19, 20 (1940).

[8] For examples, see War Labor Disputes Act, 57 STAT. 163 (1943), 50 U. S. C. App. §§1501-1511 (Supp. 1946); Lea Act, 48 STAT. 1064 (1934), as amended, 60 STAT. 89, 47 U. S. C. A. §506 (Supp. 1946).

a change in fundamental sympathy, until finally it became evident to even the most casual observer that Congress had shifted its fear from the danger of a strong management force oppressive of labor to a fear of union organization which it considered strong enough to constitute a threat to the public welfare.[9]

This new congressional attitude attained its fullest expression in the Eightieth Congress. In June of 1947 the Taft-Hartley Act was passed.[10] While it retained the provisions of the Wagner Act protecting the organization of trade unions, it established new rules and procedures designed to protect management and regulate labor. Of most significance in relation to this discussion, it broadened the participation of the federal judiciary in labor matters by providing not only for jurisdiction in aid of labor, as in the past, but also for jurisdiction over some provisions of the Act designed to restrict and police labor.

III

The enactment of the Taft-Hartley Act may well mark the beginning of a new role for the federal courts in the field of labor-management relations—a role for which they were earlier considered unsuited.

Particularly noteworthy in this regard are the provisions of Section 301 of Title III of the Act.

This section provides that in suits for violation of labor contracts, the jurisdiction of the subject matter in the federal courts may be predicated upon the fact that the case involves "an employer and a labor organization representing employees in an industry affecting commerce."[11]

The evident breadth of this grant of jurisdiction has already evoked challenges of its constitutionality from several sources.[12]

The section further seeks to widen the doors of the federal courts by its generous provisions concerning jurisdictional amount,[13] venue,[14] service of process,[15] and agency.[16] Provisions in other portions of the Act also serve to increase the powers of the federal courts in the regulation of labor.[17]

The purpose of Congress in establishing this new role for the federal judiciary in

[9] It is, of course, not the purpose of this paper to consider whether this position was justified or not.

[10] 29 U. S. C. A. §151 (Supp. 1947). Senate bill, S. 1126; House bill, H. R. 3020.

[11] Section 301(a), 29 U. S. C. A. §185(a) (Supp. 1947).

[12] Minority Report of the Committee on Education and Labor on the Labor Management Relations Act, 1947. H. R. REP. No. 245, 80th Cong., 1st Sess. 109-110 (1947). Olverson, *Collective Bargaining and the Taft-Hartley Labor Act*, 33 VA. L. REV. 549, 577 (1947); *Hearings before the Committee on Labor and Public Welfare on S. 55 and S. J. Res. 22*, Pt. 1, 80th Cong., 1st Sess. 56, 57 (1947); Minority Views of the Committee on Labor and Public Welfare, SEN. REP. No. 105, Pt. 2, 80th Cong., 1st Sess. 14 (1947).

[13] Section 301(a), cited *supra* note 11.

[14] Section 301(c), 29 U. S. C. A. §185(c) (Supp. 1947).

[15] Section 301(d), 29 U. S. C. A. §185(d) (Supp. 1947).

[16] Section 301(e), 29 U. S. C. A. §185(e) (Supp. 1947).

[17] On this *see* Notes, *The Taft-Hartley Act*, 96 U. OF PA. L. REV. 67 *et seq.* (1947); Comment, *The Labor-Management Relations Act of 1947*, 42 ILL. L. REV. 444 (1947); Witte, *Labor-Management Relations under the Taft-Hartley Act*, 25 HARV. BUS. REV. 554 (1947).

labor matters is best indicated by the statements of the members of Congress directly involved in the passage of the law.

The report of the Senate Committee on Labor and Public Welfare says:

In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the processes of the National Labor Relations Board when such breaches occur (as the bill proposes to do in title I). We feel that the aggrieved party should also have a right of action in the Federal courts. . . .

The laws of many States make it difficult to sue effectively and to recover a judgment against an unincorporated labor union. It is difficult to reach the funds of a union to satisfy a judgment against it. In some States it is necessary to serve all the members before an action can be maintained against the union. This is an almost impossible process. . . .

If unions can break agreements with relative impunity then such agreements do not tend to stabilize industrial relations. . . . Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.

Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce. . . .[18]

. . .

The initial obstacle in enforcing the terms of a collective agreement against a union which has breached its provisions is the difficulty of subjecting the union to process. The great majority of labor unions are unincorporated associations. At common law voluntary associations are not suable as such. . . . As a consequence the rule in most jurisdictions, in the absence of statute, is that unincorporated labor unions cannot be sued in their common name. . . . Accordingly, the difficulty or impossibility of enforcing the terms of a collective agreement in a suit at law against a union arises from the fact that each individual member of the union must be named and made a party to the suit.

Some States have enacted statutes which subject unincorporated associations to the jurisdiction of law courts. These statutes are by no means uniform; some pertain to fraternal societies, welfare organizations, associations doing business, etc., and in some States the courts have excluded labor unions from their application.

. . .

In the Federal courts, whether an unincorporated union can be sued depends upon the procedural rules of the State in which the action is brought. . . .

The Norris-LaGuardia Act has insulated labor unions, in the field of injunctions, against liability for breach of contract. It has been held by a Federal court that strikes, picketing, or boycotting, when carried on in breach of a collective agreement, involve a "labor dispute" under the act so as to make the activity not enjoinable without a showing of the requirements which condition the issuance of an injunction under the act. . . .

A great number of States have enacted anti-injunction statutes modeled after the Norris-LaGuardia Act. . . .

There are no Federal laws giving either an employer or even the Government itself

[18] The requirement that the "agreements" or the "disputes" affect commerce was not retained in the final legislation, as will appear in reading Section 301, 29 U. S. C. A. §185 (Supp. 1947).

any right of action against a union for any breach of contract. Thus there is no "substantive right" to enforce, in order to make the union suable as such in Federal courts.

Even where unions are suable, the union funds may not be reached for payment of damages and any judgments or decrees rendered against an association as an entity may be unenforceable. . . .

. . .

It is apparent that until all jurisdictions, and particularly the Federal Government, authorize actions against labor unions as legal entities, there will not be the mutual responsibility necessary to vitalize collective-bargaining agreements.[19]

The proponents of the Act in the Senate suggest the necessity for the adoption of Section 301 on the ground that the state courts are inadequate to meet the needs of enforcing labor contracts because of the existence of rules of procedure in the state laws which are deemed unsound. Therefore, they conclude, the federal courts should enter this field of jurisdiction, previously the preserve of state courts, so that rules of procedure which the Federal Government prefers may take effect in this type of contract litigation. Thus the federal courts are made the instruments for the correction of state procedural limitations.

If this is a proper interpretation of the intent of Congress in enacting Section 301, it is relevant to ask the additional question, whether such an intent is consistent with the purposes of the framers of the Constitution in establishing and defining the functions of the federal courts.

IV

The only clause in the judicial article of the Constitution which might sustain the jurisdiction granted in Section 301 is the federal question clause.[20] Section 301(a) specifically excludes diversity of citizenship as a necessary condition of jurisdiction. Ordinarily, of course, diversity would constitute a basis for jurisdiction over labor contract cases between citizens of different states if all requirements concerning venue, jurisdictional amount, and process were complied with. The other categories of jurisdiction contained in Section 2 of Article III clearly have no application to, and confer no authority for, the jurisdiction conferred in Section 301.

The words of those who participated in the drafting of the Constitution and in establishing the federal judiciary as a part of the new government indicate that the federal question jurisdiction conferred in Article III, Section 2, was intended to make the federal judicial power "coextensive" with the legislative.[21] And Chief Justice Marshall indicated that the federal question jurisdiction of the federal courts was limited only by the extent of the delegated powers given to the legislature.[22]

[19] SEN. REP. No. 105, 80th Cong., 1st Sess. 15-17 (1947).

[20] "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U. S. CONST., Art. III, §2.

[21] Forrester, *The Nature of a "Federal Question,"* 16 TULANE L. REV. 362, at 364-367 (1942).

[22] "With respect to its cognizance in all cases arising under the Constitution and the laws of the United States, he says that, the laws of the United States being paramount to the laws of the particular

That this was in the minds of the framers of the Constitution is indicated by the fears expressed concerning the application of such a sweeping and inclusive grant of judicial power to the national courts.[23] James Madison, who appears to have been responsible for the "arising under" phrase,[24] did not deny the generous import of the words; he referred to the judicial power as one which of necessity "should correspond with the legislative."[25]

The basic consideration in the minds of the Federalists, in 1787, was the recognition and the fear of the power of interpretation in the hands of unsympathetic and antagonistic state court judges.[26] It was their purpose to insure that federal laws should be construed by federal judges with federal sympathies.[27] The record of Chief Justice Marshall in the interpretation of federal laws over a period of three decades reflects the wisdom and good judgment of this purpose, from the standpoint of those favoring a strong central government.[28] The need for uniformity in the

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states, there is no case but what this will extend to. Has the government of the United States power to make laws on every subject? . . . Can they go beyond the delegated powers?" Statement of John Marshall during the Virginia Convention on the Adoption of the Federal Constitution, 3 ELLIOTT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553 (2d ed. 1836).

[23] Governor Randolph said: "Notwithstanding the contempt gentlemen express for technical terms, I wish such were mentioned here. I would have thought it more safe, if it had been more clearly expressed. What do we mean by the words *arising under the Constitution?* What do they relate to? I conceive this to be very ambiguous. If my interpretation be right, the word *arising* will be carried so far that it will be made use of to aid and extend the federal jurisdiction." *Id.* at 572.

Mr. Grayson said: "My next objection to the *federal judiciary* is, that it is not expressed in a definite manner. The jurisdiction of all cases arising under the Constitution and the laws of the Union is of stupendous magnitude.

"It is impossible for human nature to trace its extent. It is so vaguely and indefinitely expressed, that its latitude cannot be ascertained." *Id.* at 565.

Mr. George Mason said: "I am greatly mistaken if there be any limitation whatsoever, with respect to the nature or jurisdiction of these courts. If there be any limits, they must be contained in one of the clauses of this section; and I believe, on a dispassionate discussion, it will be found that there is none of any check. All the laws of the United States are paramount to the laws and constitution of any single state. 'The judicial power shall extend to all cases in law and equity arising under this Constitution.' What objects will not this expression extend to? Such laws may be formed as will go to every object of private property. . . . To what disgraceful and dangerous length does the principle of this go! . . . To those who think that one national, consolidated government is best for America, this extensive judicial authority will be agreeable; . . ." *Id.* at 521-522.

[24] On July 18, 1787, during the Constitutional Convention, Madison proposed: "'That the jurisdiction shall extend to all cases arising under the Nat. Laws: And to such other questions as may involve the Nat. peace & harmony,' which was agreed to nem con." HUNT AND SCOTT, DEBATES IN THE FEDERAL CONVENTION OF 1787 279 (1920); *see also* MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 39 (1911).

[25] Madison said: "The first class of cases to which its jurisdiction extends are those which may arise under the Constitution; . . . With respect to the laws of the Union, it is so necessary and expedient that the judicial power should correspond with the legislative, that it has not been objected to." 3 ELLIOTT, *op. cit. supra,* note 22, at 532.

[26] Bishop Hoadly expressed it in this manner: ". . . whoever hath an *absolute authority to interpret* any written or spoken laws, it is *he* who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them." Sermon (1717), quoted in J. C. GRAY, THE NATURE AND SOURCES OF THE LAW 125 (2d ed. 1927).

[27] The principles of Gestält psychology are interesting and provocative in this connection.

[28] For an excellent study of the Supreme Court, and particularly the record of Chief Justice Marshall, see CHARLES G. HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS, 1789-1835 (1944). A chart reflecting the course of Marshall's decisions is set forth on p. 611. It shows his record to be strongly nationalist.

interpretation and application of federal laws was also a consideration of substantial importance in giving the Federal Government its own judiciary.[29]

In matters where Congress has set up a broad legislative program and policy, within one of the legislative powers delegated in the Constitution, it may be argued that Congress is acting within the constitutional intent which has just been discussed in granting jurisdiction to the federal courts over all litigation connected with and forming a part of such a program. It may be said that this is true though the jurisdiction includes cases connected with the program which would otherwise be within the jurisdiction of the state courts only. It may be said that cases involving only questions of fact, rather than the actual interpretation of federal law, should be within the province of the federal courts on the ground that the federal program or policy may be thwarted just as effectively and completely in such litigation as in that involving questions of law.[30] The result of such an approach—and this appears to be the approach reflected in the language of Section 301 of the Taft-Hartley Act—may profoundly disturb those who fear the advance of federal power. For here is an example of the potential blotting out of state judicial power on the same level as that which the country has experienced in relation to the liberal and free interpretation of the federal legislative powers in such fields as commerce, taxing and spending, and the war power.[31]

But it may be said, on the other hand, that while the Constitution may bear the construction which finds an intent to safeguard federal plans and legislative programs through a friendly federal judiciary, it is going beyond the fair purport of the Constitution to permit the federal judicial system to be used as a means of indirect reform and modification of the rules of procedure of the states. The ultimate answer may possibly be found by inquiring whether the fundamental object in Section 301 is to implement a federal plan for the regulation of labor-management relations under the commerce power or to reform state rules of procedure in a single field—contract litigation involving labor.

V

The intent, however, of the drafters of law is one thing; the actual interpretation and application of the words of the law by the courts may be another. This proposition is particularly cogent in relation to federal question jurisdiction. But before this point is applied to the subject under discussion it is necessary to review some legal fundamentals.

Consider first the elementary proposition that the federal courts are courts of limited jurisdiction in the same sense that the federal government is one of limited

[29] "'Thirteen independent courts,' says a very celebrated statesman (and we have now more than twenty such courts), 'of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.'" Cohens v. Virginia, 6 Wheat. 264, 415-416, (U. S. 1821).

[30] See Forrester, *Federal Question Jurisdiction and Section 5*, 18 TULANE L. REV. 263, at 287 (1943).

[31] The writer intends to offer no attitude one way or the other on this matter in this paper.

powers. This is so because the federal government and its courts are authorized to exercise only those powers conferred upon them in the Constitution. State governments and state courts, on the other hand, are of general and residual jurisdiction.

Consequently, in order to determine the powers of the federal courts one must look to the language of the judicial article of the Constitution, Article III. If the federal courts attempt to exercise a power which is not set forth therein the attempt is unconstitutional. Not only must the power be contained in Article III; in addition, Congress must pass a statute authorizing the courts to exercise the jurisdiction.[32]

But if Congress passes a statute presuming to authorize the federal courts to handle cases which are not within the terms of Article III the statute is unconstitutional.

In relation to the jurisdiction of the federal courts in labor matters, Congress, in Section 301 of the Taft-Hartley Act, has authorized jurisdiction so broad that it must approach, if it does not exceed, the limits of Article III. For that reason, in addition to its current interest, the Act affords a good basis for the theoretical consideration of the scope of federal jurisdiction in the field of labor law.[33]

Section 301(a) says:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Clearly, the constitutionality of this broad grant of jurisdiction is based upon the words ". . . in an industry affecting commerce . . ."

A reflection of the congressional intent in the use of these words is found in the following statement from the report of the Committee of Conference on the bill:

> Section 302 of the House bill and section 301 of the Senate amendment contained provisions relating to suits by and against labor organizations in the courts of the United States. The conference agreement follows in general the provisions of the House bill with changes therein hereafter noted.
>
> Section 302(a) of the House bill provided that any action for or proceeding involving a violation of a contract between an employer and a labor organization might be brought by either party in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy, if such contract affected commerce, or the court otherwise had jurisdiction. Under the Senate amendment the jurisdictional test was whether the employer was in an industry affecting commerce or whether the labor organization represented employees in such an industry. This test contained in the Senate

[32] The original jurisdiction of the Supreme Court, expressly referred to in Article III, is an exception to this rule.

[33] Section 216(b) of the Fair Labor Standards Act, 52 STAT. 1069 (1938), 29 U. S. C. §216(b) (1940), also contains a generous provision for jurisdiction as it has been construed by the courts. *See* note 7, *supra*. The language of the Taft-Hartley Act appears broader, however, and thus affords a better basis for consideration of the fundamental problem. But the analysis of the cases in relation to the extent of federal question jurisdiction in labor disputes, set forth hereinafter, is applicable, in general, to the validity of the grant of jurisdiction in connection with Fair Labor Standards cases.

amendment is also contained in the conference agreement, rather than the test in the House bill which required that the "contract affect commerce."[34]

Thus, whereas the House bill confined jurisdiction to those cases in which the contract involved in the case actually affected commerce (or jurisdiction existed on other, regular grounds), the bill as enacted sets up a much broader test by leaving out the requirement that the particular contract affect commerce and by requiring only that the industry affect commerce. It should also be noted that the congressional intent, as reflected by the above report, is that the jurisdictional requirement of the statute is met if either (1) the industry in which the employer is engaged affects commerce, or (2) the labor organization represents employees in an industry which affects commerce.

Accordingly, it would appear that neither the employer, the employees, nor the labor organization need affect, nor be engaged in, commerce to come within the grant of jurisdiction, so long as there is involved an industry which affects commerce. Furthermore, it could be argued under the wording of the statute and report that the particular employer and his employees need not be in an industry affecting commerce, if the labor organization represents employees in some other plant which is in an industry affecting commerce.

Additional questions are evident concerning the meaning and scope of the terms "labor organization"[35] and "industry affecting commerce."[36]

Is such a broad grant of jurisdiction by Congress to the federal courts within the limitations of the federal question clause of Article III? Can it be said that the general reference to "an industry affecting commerce" may justify the conclusion that all litigation referred to in Section 301 concerning labor contracts involves suits " . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; . . ."?[37]

The answer to this question has been complicated by conflicting decisions of the United States Supreme Court. There are, however, only a few basic cases which are involved in the problem and which also form the basis for the confusion. Hundreds of other cases have been decided concerning the interpretation and meaning of the words "arising under,"[38] but they simply repeat and frequently cite the basic decisions.[39]

[34] H. R. REP. No. 510, 80th Cong., 1st Sess. 65-66 (1947).

[35] *See* §501(3), 29 U. S. C. A. §142(c) (Supp. 1947).

[36] *See* §501(1), 29 U. S. C. A. §142(a) (Supp. 1947).

[37] U. S. CONST., Art. III, §2(1).

[38] For a study of these cases, see Chadbourn and Levin, *Original Jurisdiction of Federal Questions*, 90 U. OF PA. L. REV. 639 (1942); Forrester, *The Nature of a "Federal Question,"* 16 TULANE L. REV. 362 (1942); Forrester, *Federal Question Jurisdiction and Section 5*, 18 TULANE L. REV. 263 (1943).

[39] The case of *Re* Metropolitan Railway Receivership, 208 U. S. 90 (1908), has been cited in two instances to support the argument that §301(a) is unconstitutional. Olverson, *Collective Bargaining and the Taft-Hartley Labor Act*, 33 VA. L. REV. 549, 578 (1947); H. R. REP. No. 245, 80th Cong., 1st Sess. 109-110 (1947). This case follows and is based upon Gold-Washing & Water Co. v. Keyes, 96 U. S. 199 (1877), which is one of the basic cases referred to. The *Metropolitan* case cites the case of Defiance Water Co. v. Defiance, 191 U. S. 184 (1903) for its rule and the *Defiance* case cites and is

VI

The basic and leading case defining the scope of the "arising under" (federal question) clause in the Constitution is the *Osborn* case of 1824, in which Chief Justice Marshall wrote the opinion.[40] It was an opinion in which Marshall played to the full his role as a Federalist judge interested in sustaining and enlarging the power of the Federal Government—in this instance, the federal judicial power.

While the decision is so lengthy that it exhausts the student who seriously attempts to analyze it, and has portions which appear to be contradictory—so contradictory, in fact, that they have been quoted separately in subsequent cases to reach contrary results—it holds, in effect, that if Congress has the constitutional power to pass a law creating legal rights, the federal courts can be given jurisdiction by Congress to handle all litigation arising by reason thereof.

The *Osborn* case not only constitutes the leading exposition of the meaning of the constitutional clause, but also serves to illustrate its application in an actual problem.

Congress enacted a law issuing a charter to the Bank of the United States and giving the federal courts jurisdiction of all suits involving the bank. No distinction was made between suits involving the meaning and interpretation of the law establishing the bank and suits involving issues of fact concerning only the customary and ordinary business of the bank. Marshall considered whether such a broad grant of jurisdiction was within the federal question clause of the Constitution.

First he observed that:

> The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law.[41]
>
> . . .
>
> This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.[42]

What he meant by the word "construing" and the later words, "a form that the judicial power is capable of acting on," is demonstrated by the remainder of the opinion.

He said that since the bank had been chartered by an act of Congress, it "can

based upon the *Gold-Washing* case, which will be referred to specifically later herein. The language of the *Metropolitan* case which is referred to in support of the argument that §301(a) is unconstitutional is found at page 109 of the opinion: "A case under the Constitution or laws of the United States does not arise against a railroad engaged in interstate commerce from that mere fact. It only arises under the Constitution, or laws or treatics of the United States, when it substantially involves a controversy as to the effect or construction of the Constitution or on the determination of which the result depends." As will be noted later, this language referred to the words "arising under" as used in a statute, rather than as used in Article III of the Constitution.

[40] Osborn v. Bank of the United States, 9 Wheat. 738 (U. S. 1824).

[41] *Id.* at 818.

[42] *Id.* at 819.

acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. . . . Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?"[43]

When a bank sues [he continued], the first question which presents itself, and which lies at the foundation of the cause is, has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any court? This depends on a law of the United States. . . .[44] The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. . . . The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defense, it is still a part of the cause, and may be relied on.[45]

. . .

The clause in the patent law, authorizing suits in the circuit courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defense exclusively on the fact that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the court, or establish the position, that the case does not arise under a law of the United States.[46]

. . .

Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law.[47]

Under the *Osborn* case, it would appear that if Congress, by legislative act, chartered an employer or a labor organization it would clearly have the constitutional authority to give the federal courts jurisdiction over all cases, including labor contract disputes, involving the employer or the labor organization.

But the jurisdiction granted in Section 301 is more inclusive. Employers and labor organizations existing entirely apart from any federal charter are covered.

Section 301 bases its constitutionality on the commerce clause, rather than a federal charter.[48] And so it raises a question which goes beyond the scope of the *Osborn* case—whether Congress can give the federal courts jurisdiction over litigation which is ordinarily within state court jurisdiction, merely on the ground that the employer or the labor organization involved in the litigation is in an industry which affects commerce. It has already been noted that the employer need not affect commerce, the labor organization need not affect commerce, the particular contract or dispute need not affect commerce. It is only required that the industry of either the employer or the labor organization affect commerce. While the suggestion that the commerce power is so pervasive may not be novel where the power of the legislature is concerned, its full implications concerning the scope of the federal judicial power are most interesting, to say the least.

[43] *Id.* at 823. [44] *Id.* at 823-824. [45] *Id.* at 824.
[46] *Id.* at 826. [47] *Id.* at 827.
[48] In McCulloch v. Maryland, 4 Wheat. 316 (U. S. 1819), the Court held that the Federal Government had the power to establish a bank as an incidental power necessary and proper to carry into execution expressly delegated powers, such as the fiscal power and the taxing and spending powers.

Serious doubt was expressed in the House and the Senate concerning the constitutionality of such a broad grant of jurisdiction.[49] Indeed, the original apprehensions expressed at the time of the adoption of the Constitution concerning the potential application of the words "arising under" seem to be justified by this new law.[50] Nevertheless, those apprehensions to some degree sustain, rather than argue against, the constitutionality of Section 301(a). No positive denial is to be found in response to these fears concerning the breadth of the clause. Silence in rebuttal, evident in Madison's Notes covering the proceedings and debates in the Philadelphia convention, and in the Federalist papers and other sources, would seem to suggest that perhaps the clause does have such wide scope. If so, the potential extent of federal judicial power seems no more limited than the potential extent of the legislative power under the broad areas of the commerce clause, the war power, the power to tax and spend for the general welfare, and the other sweeping and growing sources of power in the Federal Government.

VII

But the words "arising under" have not always been given the broad meaning attributed to them in the *Osborn* case.

In the Act of March 3, 1875, Congress provided:

> That the circuit courts of the United States shall have original cognizance . . . of all suits . . . arising under the Constitution or laws of the United States. . . .[51]

Except for the abortive Act of February 13, 1801,[52] passed by the Federalists, which was repealed in the next year,[53] Congress had not, prior to 1875, given the lower federal courts jurisdiction over federal question cases, except in special instances such as the grant of jurisdiction for the bank considered in the *Osborn* case.

The words of the Act of March 3, 1875, and the words of Article III are substantially identical. The words "arising under" are used in both to describe the grant of federal question jurisdiction. It would seem that the conclusion should be that Congress intended to bestow all the federal question jurisdiction of Article III on the federal trial courts.[54] One would certainly be inclined to assume that the same words have the same meaning.

In fact, Senator Matthew H. Carpenter, the draftsman of the Act, said:

> The Constitution says that certain judicial powers shall be conferred upon the United States. The Supreme Court of the United States in an opinion delivered by Judge Story[55] . . . said that it is the duty of the Congress of the United States to vest all the judicial power of the Union in some Federal court, and if they may withhold a part of it they

[49] See note 12 *supra*.
[50] See note 23 *supra*.
[51] REV. STAT. §§563, 629 (1873); 34 STAT. 1091 (1911), as amended, 28 U. S. C. §41(1) (1940).
[52] 2 STAT. 89, 92 (1801).
[53] 2 STAT. 132 (1802).
[54] *Cf.* the article by Chadbourn and Levin, cited *supra*, note 38, in which they give §5 of the Act of March 3, 1875, a restrictive role in connection with the application of the "arising under" clause of the statute. A different view was taken by this writer in the articles referred to in the same note.
[55] Carpenter was referring to Martin v. Hunter's Lessee, 1 Wheat. 304, 330 (U. S. 1816).

may withhold all of it and defeat the Constitution by refusing or simply omitting to carry its provisions into execution.

The Act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does.

This bill gives precisely the power which the Constitution confers—nothing more, nothing less.[56]

But in assuming that the repetition in the statute of the words of Article III would have the effect of giving "precisely the power which the Constitution confers," Senator Carpenter failed to reckon with the power of statutory interpretation possessed by the courts, whereby words come to mean what the courts want them to mean.[57]

For despite the identity of the language of the statute with that of the Constitution, as well as this emphatic expression of intent in Congress, the federal courts reached a result which substantially limited the meaning of "arising under," at least as used in the statute.[58]

In the first Supreme Court case which actually gave consideration to the new law the Court said:

In the language of Chief Justice Marshall, a case "may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either" (Cohens v. Virginia . . .); or when "the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction" (Osborn v. Bank of the United States . . .). A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.[59]

It is particularly interesting to note that the court cited the *Osborn* case—incorrectly and by lifting out of context a portion of the opinion which can only be understood by reading the entire opinion—as authority for an interpretation of the meaning of "arising under" which is much more narrow than the interpretation given the words by the *Osborn* decision, if the opinion is read as a whole.

The leading modern case on the matter is *Gully v. First National Bank*,[60] in which Mr. Justice Cardozo wrote the opinion. The case concerned the power of the State of Mississippi to tax the shares of a national bank. Federal jurisdiction

[56] 2 CONG. REC., Pt. 5, 4986-4987 (1874).

[57] "The question is," said Alice, "whether you *can* make words mean so many different things." "The question is," said Humpty Dumpty, "which is to be master—that's all." LEWIS CARROLL, THROUGH THE LOOKING GLASS.

[58] This result, in which the Supreme Court proved Bishop Hoadly as well as Humpty Dumpty to be right, was brought about, as a practical matter, by the desire of the federal courts to hold down the amount of litigation coming to them.

[59] Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, at 201, 203 (1877).

[60] 299 U. S. 109 (1936).

was sought on the ground that the case was one "arising under" federal law because a federal statute was allegedly involved which permitted states to tax national banks provided certain conditions were complied with. The Court held that there was no federal question in the case, and Cardozo said:

> How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books. . . .
>
> Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an act of Congress. [Citing the *Osborn* case] . . . "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends."[61]

Cardozo makes no effort here to distinguish between the constitutional phrase "arising under" and the statutory one. By his reference to the *Osborn* case, he challenges the validity of giving them different meanings and indicates that both have the narrow meaning which he describes.[62] Note the statement that "the early cases were less exacting than the recent ones," and his citation of the *Osborn* case as an illustration.

If the implication of Cardozo's statements concerning the *Osborn* case is that the Supreme Court will no longer recognize a difference between the constitutional phrase and the statutory one, and that both of them have the narrow meaning set forth so clearly and without qualification in the *Gully* case, the simple conclusion is that Section 301 of the Taft-Hartley Act and similar grants of federal jurisdiction are unconstitutional.

This is true because labor contract cases do not ordinarily involve a dispute or controversy respecting the validity, construction, or effect of federal law upon the determination of which the result depends. And obviously the mere fact that "an industry affecting commerce" is connected, perhaps indirectly, with the case would not meet Cardozo's test. For it is evident that the mere fact that the employer or the labor organization may be in an industry affecting commerce would not require a construction of federal law in a particular case upon which the result would depend. Usually such cases involve questions of fact or questions of contract interpretation without any disputed issue concerning interstate commerce or federal law.

It would seem that, in order to sustain the constitutionality of Section 301, the Supreme Court will be forced to qualify the language of Cardozo in the *Gully* case in so far as it relates to the Constitution and the rule of the *Osborn* case. The "early

[61] 299 U. S. 109, 112-114 (1936).

[62] It is interesting to note that the rule of the *Gully* case is taken from the *Gold-Washing* decision, which in turn cited the *Osborn* case for its authority, which in turn is criticized in the *Gully* opinion.

cases" must continue "less exacting"—particularly in the definition of "arising under" in the Constitution—or Section 301 is unconstitutional. And, of even more importance, the jurisdiction of the federal courts in such matters as patent, bankruptcy, and Fair Labor Standards Act cases is invalid as now interpreted.[63]

The issue presented in connection with Section 301 may force the Supreme Court to perform the long delayed task of clarifying the contradiction between the definitions of the words "arising under" in the statute and in the Constitution.

In view of the identity of the words it is clear that the court cannot accomplish this result in any sensible manner upon the basis of previous decisions. A reconsideration of the entire federal question field would appear necessary if the court is to clarify the present judicial disorder. The solution proposed by Messrs. Chadbourn and Levin, based upon their interpretation of Section 5 of the Act of 1875, would be workable, but its validity on the basis of congressional intent has been questioned.[64]

A far more satisfactory and proper solution, of course, would be reached if Congress should rewrite, knowingly and systematically, its statutes conferring federal question jurisdiction. This can be accomplished by enacting statutes expressly and intentionally limiting the number of cases coming into the federal courts by some orderly device, such as the one claimed for Section 5 by Messrs. Chadbourn and Levin, while recognizing the necessity for the broad meaning of the "arising under" clause in the Constitution, established by the *Osborn* decision.

VIII

Even under such a program, however, the constitutionality of a grant of jurisdiction such as that contained in Section 301 would be doubtful. Under either the definition of the *Osborn* case or that of the *Gully* case, the validity of the section is subject to question. If the narrow definition of "arising under" set forth in the *Gully* case should be applied by the Supreme Court to the constitutional phrase—and Cardozo made no distinction—Section 301 is unconstitutional for the reasons previously presented.

If, on the other hand, Cardozo's remarks casting doubt upon the breadth of the constitutional phrase as defined in the *Osborn* case are ignored—as the writer believes they should be—the ultimate question remains whether even the generous definition of the *Osborn* case is sufficiently broad to sustain the grant of jurisdiction contained in Section 301. For even under that definition, there is still the problem of whether it is constitutional to grant jurisdiction over ordinary contract cases involving labor, merely because one of the parties to the contract is in an "industry affecting commerce."

It is important to note again the following words in the *Osborn* opinion:

> . . . it is said that the legislative, executive, and judicial powers of every well con-

[63] The federal courts often handle litigation in these fields which involves only issues of fact with no dispute whatever concerning the law.

[64] Forrester, *Federal Question Jurisdiction and Section 5*, 18 TULANE L. REV. 263 (1943).

structed government are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature *the power of construing* every such law. . . .[65]

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States, when *any question respecting* them shall assume such a form that the judicial power is capable of acting on it. . . .[66]

"The power of construing . . . any question respecting" federal law is applied in the *Osborn* case to mean that the courts may be given jurisdiction to handle any case, whether ordinarily within state court jurisdiction or not, and including contract cases comparable to those involved in Section 301, if an act of Congress—a valid federal law—creates an entity or organization which is a party to the case. Such an entity "can acquire no right, *make no contract,* bring no suit, which is not authorized by a law of the United States."[67]

But does the jurisdiction granted in Section 301 come within this rule, for all its liberality?

Ordinarily, of course, neither an employer nor a labor organization would be created by federal law, as was the bank.

But can it be said that Congress, by creating, through a federal law, *a federal plan* of control of labor matters, has created an *entity* which may be compared, by analogy, with the bank?

An affirmative answer to this question would appear to be the crux of any argument seeking to sustain the constitutionality of Section 301.

One may argue in support of such a view that the federal plan—the entity—is based validly upon the commerce power of the federal legislature in the same manner and with the same force that the bank—the entity—was based validly upon the fiscal power of the federal legislature.[68] Both, the proponent may claim, owe their existence to, and are authorized by, a law of the United States.

It may be argued that as a matter of constitutional policy there is no stronger reason for permitting Congress, in its discretion, to give jurisdiction to the federal courts over all cases involving a bank created by it than for permitting it to give jurisdiction over all litigation involving a federal plan or program which it has established. In both instances it may be said with justification that Congress should be possessed of the power to see that uniform and impartial judicial treatment is given the litigation (factual or legal) which may involve either. The observation has already been made that there is good reason, from the federal standpoint, for insisting upon the trial of issues of fact in a sympathetic and unified

[65] 9 Wheat. 738, 818 (U. S. 1824). (Italics supplied.)
[66] *Id.* at 819. (Italics supplied.)
[67] *Id.* at 823. (Italics supplied.)
[68] See note 48 *supra.* The implications of the *McCulloch* case in this connection are substantial and call for study beyond the scope of this paper. The writer can only suggest the relevance of this case herein.

judicial system just as there is good reason for insisting upon the trial of issues of law in such courts. Potentially, at least, state courts can abuse their jurisdiction and create lack of uniformity in the trial of issues of fact and simple issues of contract law in connection with a federal plan for the regulation of labor-management relations just as they could in matters involving a federal bank—a part of a federal plan for the regulation of fiscal affairs.

True enough, under such an interpretation Congress could, if it should take full advantage of it, completely swamp the federal judges with litigation—far more than their present number and the present structure of the federal judicial system would bear. But broad power must rest somewhere in every system of government, and the potential abuse of the necessary power of government is no argument against its existence.[69] Perhaps we must trust, in this as in many other areas of governmental action, that the legislature will not abuse the power but will exercise it prudently within its discretion.

It is also worthy of note that, if the legislature goes too far, the courts may protect themselves through their power of statutory interpretation. The federal courts faced such a problem in connection with the Act of March 3, 1875, and solved it, even though in a clumsy way, by the *Gold-Washing* decision, which drastically reduced the number of cases Senator Carpenter intended they should receive. It is possible that the federal judiciary may give such a performance again in connection with Section 301, particularly if the practical effect of the section is to bring a flood of cases into the courts.

However, there is no certainty that the federal courts will object to being given this power over labor disputes, even though it may mean a substantial increase in their business. To the contrary, some federal judges have complained about the growth of the power of judging in administrative agencies. But it is significant that if the present grant of power over labor matters is held constitutional, the power will have been clearly established in Congress to grant broad jurisdiction over many other fields, unrelated to labor, which the federal courts might neither desire nor be able to handle within their present structure.

In opposition to the the constitutionality of Section 301 one may insist upon an application of the words in the *Osborn* case in a manner more narrow than that indicated in support of the grant. Reduced to a matter of policy, as are so many questions of constitutionality where the courts play the role of Humpty Dumpty and make words mean what they want them to mean, the objections to Section 301 are substantial.

The effect of construing Article III to sustain the constitutionality of Section 301 would seem to be to make the judicial power completely coextensive with the

[69] "It is always a doubtful course to argue against the use or existence of a power, from the possibility of its abuse. . . . From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse." From the opinion of Mr. Justice Story in Martin v. Hunter's Lessee, 1 Wheat. 304, 344-345 (U. S. 1816).

legislative power. Whereupon, one must recognize the possibility—even though it may be a remote one—that the federal government could move into and blot out much of state judicial power as it now exists. This will suggest hesitation at least to those who view with alarm the growth of federal legislative power from such broad sources as the commerce, taxing and spending, and war powers. Indeed, the very Congress which passed Section 301 has claimed for itself the protective role of preventing such expansion, at least in the field of legislation.

This contradiction suggests that all factions are willing to countenance the concentration of power in the federal government when it serves the objects they desire.

THE FUNCTION OF THE LOWER FEDERAL COURTS AS PROTECTORS OF CIVIL LIBERTIES

OSMOND K. FRAENKEL*

The judicial power of the United States lies in a Supreme Court and such inferior courts as Congress may create, and the jurisdiction of these courts extends to all cases arising under the Constitution.[1] Since the Constitution, with its amendments, contains many provisions guaranteeing civil rights to individuals, it is evident that the federal courts have an important role to play in giving meaning and efficacy to civil liberties.

By virtue of the federal character of our government this is a dual role: the courts are concerned with violations of civil rights by both the states and the Federal Government. Despite the absence of specific authority in the Constitution, the Supreme Court early began to exercise the right to review such violations where it concluded they had infringed rights constitutionally guaranteed. This power has been used increasingly in recent years in cases affecting civil liberties. The Supreme Court's function in this field in reviewing state decisions has been frequently and fully discussed. By now, even though the Court's action in a particular case may still cause surprise, its function is generally understood. Less well known, however, is the role of the lower federal courts in dealing with such liberties.

Although the Constitution clearly authorizes Congress to invest the lower federal courts with jurisdiction over all cases arising under it, that body did not effectively do this for nearly a century. In the original Judiciary Act of 1789, Congress gave no express power to the inferior federal courts which were then established to determine controversies arising under the Constitution. Such power was given, of course, as part of the grant of jurisdiction based on diversity of citizenship, but this was limited to controversies involving more than $500.[2] In 1801 Congress for the first time granted the direct power to deal with cases arising under the Constitution, regardless of citizenship, but almost immediately withdrew it,[3] and it was not until 1875 that the power was definitely made part of the federal judicial system.[4] The application of the new provision was, however, limited by the requirement

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[1] U. S. CONST. Art. III, §§1 and 2.

[2] Act of Sept. 24, 1789, c. 20, §9; 1 STAT. 76.

[3] Act of Feb. 13, 1801, c. 4, §11; 2 STAT. 89, repealed 2 STAT. 132 (1801).

[4] Act of March 3, 1875, c. 137, §1; 18 STAT. 47, now 36 STAT. 1091 (1911), as amended, 28 U. S. C. §41(1) (1940).

that a monetary claim be involved. In 1887 the amount was increased from $500 to $2,000;[5] since 1911 it has stood at $3,000.[6]

With respect to certain limited constitutional issues, however, Congress gave the federal courts jurisdiction without regard either to diversity of citizenship or to the amount involved as early as 1871. These provisions were part of the various civil rights laws by which Congress sought to implement the post-Civil War amendments. They dealt primarily with the denial of equal protection,[7] but extended also to include denial of any federally guaranteed right "under color" of any state law or custom.[8] At the same time Congress permitted the removal to a federal court of any state criminal prosecution when it threatened to deny "equal civil rights."[9] This last provision has had very limited effectiveness because of the Supreme Court's interpretation of the law as requiring denial of such rights by a state statute.[10] The most extensive development of federal jurisdiction in relation to state action has come in connection with that provision which deals with action taken under color of state law.

The federal courts have been concerned also with the denial of civil rights by private persons. Here they are restricted by Supreme Court rulings to the effect that many rights are protected by the United States Constitution only against infringement by state action, and redress for wrongs done by private persons can be had only under state law. Hence, attempts by Congress to give federal courts jurisdiction over suits against innkeepers or carriers accused of discrimination based on race were held unconstitutional.[11] Since the Thirteenth Amendment, which forbids slavery, is broader in scope than the Fourteenth, which guarantees equal protection of the laws, direct federal action can be taken against private persons who practice peonage.[12]

Whether Congress can make lynching by private persons a federal crime is open to serious question. Where state officers are involved federal jurisdiction is clear; otherwise it is doubtful.[13] Political considerations have, however, prevented the enactment of any law of this kind under which the limits of federal power might be tested.

[5] Act of March 3, 1887, c. 373, §1; 24 STAT. 552 (1887), 36 STAT. 1091 (1911) as amended, 28 U. S. C. §41(1) (1940).

[6] Act of March 3, 1911, cc. 231, 324; 36 STAT. 1091 (1911), as amended, 28 U. S. C. §41(1) (1940).

[7] Act of April 20, 1871, c. 22 §§2, 6; 17 STAT. 13, 15 (1871); 36 STAT. 1092 (1911), as amended, 28 U. S. C. §41(12), (13), (1940), and REV. STAT. §1980 (1875), 8 U. S. C. §47 (1940); Act of March 1, 1875, c. 114, §4, 18 STAT. 336, Pt. III (1875), 8 U. S. C. §§44, 45 (1940).

[8] Act of April 20, 1871, c. 22, §1; 17 STAT. 13 (1871), 36 STAT. 1092 (1911), as amended, 28 U. S. C. §41(14) (1940).

[9] Act of May 31, 1870, c. 114, §§16, 18; 16 STAT. 144; now 36 STAT. 1096 (1911), 28 U. S. C. §74 (1940).

[10] Kentucky v. Powers, 201 U. S. 1 (1906).

[11] Civil Rights Cases, 109 U. S. 3 (1883).

[12] United States v. Reynolds, 235 U. S. 133 (1914).

[13] See Screws v. United States, 325 U. S. 91 (1945); MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 74-90 (1947). *But see Ex parte* Riggins, 134 Fed. 404 (N. D. Ala. 1904), *appeal dismissed*, 199 U. S. 547 (1905), where an indictment of private persons was held good because they were charged with the lynching of a Negro while in custody of state officials under charges of crime.

The federal courts may also proceed directly against violators of rights secured by the United States Constitution. Among the rights so included are the right to vote for members of Congress,[14] to enter public lands,[15] to give information with regard to a federal offense,[16] to be protected from violence while in custody of a federal officer,[17] and to travel from state to state.[18]

Federal courts, of course, are also concerned with the denial of civil rights by the federal government itself—in the interpretation of statutes challenged as unconstitutional, the review of administrative action, or the exercise of the judicial function itself. We shall not concern ourselves, however, with these problems. The basic substantive questions are the same in the review of both federal and state action. Special procedural problems have arisen, however, in the review of state action, because of the delicate nature of the relation between the Federal Government and the states. These problems are not always thoroughly understood and to some extent the rules underlying them require revision.

Challenge of state action in the federal courts grew, at first, mostly out of post-Civil War discrimination against the Negroes' rights to vote, to serve on juries, and generally to become first-class citizens—rights which have still to be fought for. During the last two decades federal jurisdiction has been invoked in aid of other rights, such as freedom of religion and speech. This development has resulted from decisions of the Supreme Court by which most of the specific guarantees of the federal Bill of Rights have been siphoned into the due process clause of the Fourteenth Amendment.[19]

Practically all forms of judicial proceeding have been invoked in efforts to redress grievances: actions at law for damages, suits in equity to enjoin the enforcement of some law or other expected state action, suits for declaratory judgment to define threatened rights, applications for writs of habeas corpus to challenge detention, and criminal prosecutions.

The Supreme Court has had occasion to consider each of these procedures and has announced certain limitations on the effectiveness of most of them. The most serious of these limitations requires application for relief to state courts before address to a federal court—and how often, then, is it futile to try to get action of any kind from the federal court! This particular difficulty arises most often in the field of habeas corpus.

[14] *Ex parte* Yarbrough, 110 U. S. 651 (1884); United States v. Classic, 313 U. S. 299 (1941).
[15] United States v. Waddell, 112 U. S. 76 (1884).
[16] Motes v. United States, 178 U. S. 458 (1900).
[17] Logan v. United States, 144 U. S. 263 (1892).
[18] See Crandall v. Nevada, 6 Wall. 35 (U. S. 1868); United States v. Wheeler, 254 U. S. 281 (1920); Edwards v. California, 314 U. S. 160 (1941).
[19] See OSMOND K. FRAENKEL, OUR CIVIL LIBERTIES 46-50 (1944); Wilkinson, *The Federal Bill of Rights and the 14th Amendment*, 26 GEO. L. J. 439 (1938); Fraenkel, *One Hundred and Fifty Years of the Bill of Rights*, 23 MINN. L. REV. 719 (1939). And see Adamson v. California, 67 Sup. Ct. 1672 (1947).

THE WRIT OF HABEAS CORPUS

The writ of habeas corpus may be used to challenge the propriety of state action on constitutional grounds so basic as to vitiate the conviction attacked. Last-minute attempts to review state convictions by habeas corpus in a federal court failed to save Leo Frank[20] and Sacco and Vanzetti,[21] but did save a group of Arkansas Negroes who asserted that their trial had been dominated by mob violence.[22]

The most frequent recent use of the writ has been to explore claims that the convicted defendant has been denied counsel. Ever since the Supreme Court ruled that denial of counsel voids a conviction by a federal court, whatever the circumstances,[23] attempts have been made, without avail, to obtain a like ruling with regard to state convictions.[24] But while the absolute protection of the Sixth Amendment does not extend to defendants in state courts, the Supreme Court has ruled that due process of law does require that a state give a defendant ample opportunity to meet an accusation, and has frequently found in particular situations circumstances which make the assignment of counsel essential to the substance of the hearing required by due process.[25] Direct recourse to the federal courts has rarely been permitted.[26]

The *Hawk* cases[27] indicate the difficulty that confronts any one who tries to get relief from the federal courts in the first instance. Hawk maintained he had been convicted of murder without effective representation by counsel and that perjured evidence had been used against him with the connivance of the prosecutor. The state Supreme Court had refused relief, on the ground that application should have been made to a lower state court; various lower federal courts had also refused to act. The Supreme Court, in 1944, upheld their refusal on the ground that Hawk had not exhausted his remedies in the state courts. After an attempt to do just this failed, the Supreme Court ruled that the state courts should have given Hawk a hearing. But the state court still refused to grant a hearing, this time on the ground that Hawk had mistaken his remedy—he should have used the writ of coram nobis, not the writ of habeas corpus.[28] When he then applied to a federal

[20] Frank v. Mangum, 237 U. S. 309 (1915), Holmes and Hughes, dissenting.

[21] See OSMOND K. FRAENKEL, THE SACCO-VANZETTI CASE 178-182 (1931).

[22] Moore v. Dempsey, 261 U. S. 86 (1923).

[23] Johnson v. Zerbst, 304 U. S. 458 (1938). Actually the point first arose in a state case, the first of the Scottsboro appeals, Powell v. Alabama, 287 U. S. 45 (1932).

[24] From Betts v. Brady, 316 U. S. 455 (1942) to Foster v. Illinois, 67 Sup. Ct. 1716 (1947).

[25] As in De Meerler v. Michigan, 329 U. S. 663 (1947). Marino v. Ragen, 68 Sup. Ct. 240 (U. S. 1947).

[26] Direct recourse to a federal court was allowed in House v. Mayo, 324 U. S. 42 (1945), since state remedies had been exhausted. But the court ruled against petitioner on the facts: 63 F. Supp. 169 (S. D. Fla. 1945), *aff'd*, 151 Fed. 1014 (C. C. A. 5th 1945), *cert. denied*, 327 U. S. 814 (1946). See also Jones v. Kentucky, 97 F. 2d 335 (C. C. A. 6th 1938); Potter v. Dowd, 146 F. 2d 244 (C. C. A. 7th 1944). United States *ex rel.* Rooney v. Ragen, 158 F. 2d 346 (C. C. A. 7th 1946), *cert. denied*, 331 U. S. 842 (1947).

[27] *Ex parte* Hawk, 321 U. S. 114 (1944); Hawk v. Olson, 326 U. S. 271 (1945).

[28] The essential differences are: the writ *coram nobis* can be granted only by the court in which the conviction was had; in some states it must be asked for within a limited time; it is often not appealable.

court, he was met by the contention that he had not yet exhausted his state remedies.[29] And the Hawk case is not unique, for in many states it is not clear what remedy exists for challenging convictions of this kind.[30]

A particularly glaring instance of the consequence of the rule requiring exhaustion of state remedies was the *Mooney* case. Years after his conviction in California for murder, Mooney asserted that the chief witness against him was a perjurer, suborned by the district attorney. After he unsuccessfully sought a writ of habeas corpus in a lower federal court, the Supreme Court held that there was merit in his contentions and that the use of testimony known to be false was a denial of due process.[31] But it ruled also that Mooney must seek redress in the state courts. Accordingly, it was the California court which passed on the factual issue underlying Mooney's case, and, as was to be expected, that issue was decided against him at the hearing. On appeal, the California Supreme Court accepted the result with but one dissent, and this time the United States Supreme Court refused to interfere.[32] Justice for Mooney was left to belated executive clemency.

As it now stands, the rule that application must first be made to the state courts in effect destroys the right to apply to the lower federal courts at all. If the state court grants a hearing and decides the facts against the contention of the convicted man, no other court is likely to review this determination or grant another hearing. If the state court refuses a hearing on the ground the claim made by the accused raises no constitutional issue and the Supreme Court refuses to review on certiorari, it is pretty certain no lower federal court will thereafter grant relief and most unlikely that the Supreme Court will then take the case.[33] It is only where the state court confesses itself powerless under state procedure to grant relief that direct application to the federal court is possible.[34] This is seldom likely to happen; hence the right to apply to a lower federal court has become an illusory one.

Further, since the state courts are allowed to pass upon the factual issues, the chance of real relief to a person who contends that state officials have misconducted

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On the other hand this writ is not limited to cases in which the aggrieved person is in custody. See Gayes v. New York, 67 Sup. Ct. 1711 (1947); Woods v. Nierstheimer, 328 U. S. 211 (1946).

[29] Hawk v. Olson, 66 F. Supp. 195 (D. Nebr. 1946).

[30] In New York, for instance, this uncertainty was only recently cleared up. See People *ex rel.* Wachowitz v. Martin, 293 N. Y. 361 (1944); Matter of Hogan, 295 N. Y. 92 (1946). The unsatisfactory situation which for a long time has existed in Illinois is discussed by Mr. Justice Rutledge, concurring, in Marino v. Ragen, 68 Sup. Ct. 240, 241 (U. S. 1947).

[31] Mooney v. Holahan, 294 U. S. 103 (1935).

[32] Mooney v. Smith, 10 Cal. 2d 1, 73 P. 2d 554 (1937); *id.* 305 U. S. 598 (1938).

[33] Such a case was Stonebreaker v. Smyth, 163 F. 2d 498 (C. C. A. 4th 1947) (*Cf.* United States *ex rel* Monsky v. Warden of Clinton State Prison, 163 F. 2d 978 (C. C. A. 2d 1947)); and it has been held that state remedies have not been exhausted until review by the United States Supreme Court has been sought, Gordon v. Scudder, 163 F. 2d 518 (C. C. A. 9th 1947).

[34] As to Florida, see House v. Mayo, 324 U. S. 42 (1945); as to Indiana, see Potter v. Dowd, 147 F. 2d 244 (C. C. A. 7th 1944). In White v. Regan, 324 U. S. 760 (1945), the Court pointed out that application for certiorari is not a prerequisite to recourse to a lower federal court where the state court decision might have rested on a non-federal ground. But as to when state remedies have not been exhausted see also Woods v. Nierstheimer, 328 U. S. 211 (1946).

themselves is likewise illusory. It is too much to expect wholly impartial justice when one state official sits in judgment on another. Therefore, in situations like this, the determination of the factual issue by a federal authority seems likelier to be fair. Congress should change the existing rule so as to permit application to a federal court in the first instance when a claim is made that a federal right has been denied by improper action of state officials, whether prosecutors or judges. In this respect the proposed revision of the Judicial Code,[35] which has already passed the House of Representatives, is defective. It proposes that application to a federal court may be made in the first instance only where there is no "adequate" remedy available in state courts, or where state courts have denied a fair adjudication.

That formulation has been criticized also on the ground that the use of the word "adequate" is likely to produce further litigation and uncertainty in the field. Suggestions have come in to the effect that the words of the Johnson Act,[36] which deals with injunctions against state rate schedules, be employed here, namely: "plain, speedy and efficient." Surely if doubt exists regarding what remedy the state courts offer, relief should be had in the first instance in a federal court. It should no longer be possible to buffet a litigant like Hawk from one court to another because no one seems quite sure where the proper remedy for him lies.

INTERFERENCE WITH STATE ACTION

The most frequent instances of federal jurisdiction are attempts to prevent state authorities from carrying out certain announced policies. In some cases this involves enjoining criminal prosecutions; in others, it may involve suits for declaratory judgment with regard to the meaning of a state law.

Where no particular problem exists concerning the meaning of the state law, federal jurisdiction is plain. This was the basis on which the Witnesses of Jehovah successfully sought to enjoin the enforcement by school authorities, in various parts of the country, of their requirement that all children participate in flag salute ceremonies or be expelled.[37] Lower federal courts have permitted injunction suits under a variety of other circumstances. Thus a suit was sustained which sought to prevent segregation of Mexican children in California schools, even though the acts of the authorities were held to be contrary to state law.[38] Suits have also been successfully brought to correct discriminations in teachers' salaries due to their race.[39] On the other hand, recourse to federal courts has been denied when the relief sought has been purely political—such as to restrain state officers from arranging for an election under districting challenged as violating the Constitution.[40]

[35] H. R. 3214, 80th Cong., 1st Sess. (1947).

[36] 48 STAT. 775 (1934), amending 28 U. S. C. §41(1). See Driscoll v. Edison Co., 307 U. S. 104 (1939).

[37] Minersville School District v. Gobitis, 310 U. S. 586 (1940); Barnette v. West Virginia State Board of Education, 319 U. S. 624 (1943).

[38] Westminster School Dist. v. Mendez, 161 F. 2d 774 (C. C. A. 9th 1947).

[39] Alston v. School Board, 112 F. 2d 992 (C. C. A. 4th 1940); Thompson v. Gibbes, 60 F. Supp. 872 (E. D. S. C. 1945).

[40] Colegrove v. Green, 328 U. S. 549 (1946); *cf.* Blackman v. Stone, 101 F. 2d 500 (C. C. A. 7th

When, however, the meaning of the state statute involved is unclear, particularly when attempts are made immediately upon passage to prevent its enforcement, the situation alters. In such cases as these the Supreme Court has imposed the limitation that the state court should be given a chance to limit its application so as, perhaps, to avoid any infringement of constitutional right.

This rule, well established in cases involving ordinary property rights, was given definite application to civil liberties in a case involving the Witnesses of Jehovah. Many municipalities had attempted to restrict the activities of this sect on the public streets, by applying ordinances restricting distribution of leaflets and by requiring license fees in connection with distribution. The Supreme Court had made numerous rulings for Jehovah's Witnesses in direct review of convictions for violating these types of ordinances.[41] In one situation, however, the witnesses sought to prevent prosecution by suit for injunction. In *Douglas* v. *Jeannette*,[42] a unanimous Supreme Court held this might not be done. Chief Justice Stone stated that a federal court should not attempt in advance to pass on the various issues which might arise. He pointed out that relief by injunction had been allowed in the CIO's case against Mayor Hague of Jersey City[43] because, in that case, local officials forcibly broke up meetings and deported participants from the state, without instituting legal proceedings in which those affected could have challenged the constitutionality of the acts they complained of.

The same rule was applied in a case instituted by the American Federation of Labor to challenge an amendment to the Florida Constitution outlawing the closed shop. In that case,[44] however, the majority of the Supreme Court reached the conclusion that the federal court should retain jurisdiction of the action until the Florida courts had interpreted the constitutional provision. Why jurisdiction was retained here but was not in the case of the Witnesses of Jehovah does not become altogether clear in the opinion of Mr. Justice Douglas, although he does refer to the fact that proceedings were threatened against a large number of unions. The distinction seemed insufficient to the Chief Justice, who considered the two cases alike and believed the suit should have been dismissed. On the other hand, Justice Murphy thought the issue was so clear that it should have been passed upon by the federal court without awaiting action by the state.

The rule remains the same though the application be for declaratory judgment

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1939); Cook v. Fortson, 329 U. S. 675 (1946). Original jurisdiction in these cases was in a special three judge court under 28 U. S. C. §380 (1940), because state statutes, not merely municipal ordinances, were being attacked.

[41] Schneider v. Irvington, 308 U. S. 147 (1939); Murdock v. Pennsylvania, 319 U. S. 105 (1943).

[42] 319 U. S. 157 (1943).

[43] Hague v. C.I.O., 307 U. S. 496 (1939).

[44] A. F. of L. v. Watson, 327 U. S. 582 (1946). Original jurisdiction in this case was in a special three judge court under 28 U. S. C. §380 (1940), because a state statute, not merely a municipal ordinance, was being attacked. See also Traffic Telephone Workers' Federation of New Jersey v. Driscoll, 72 F. Supp. 499 (D. N. J. 1947), *appeal dismissed*, Justices Black and Reed dissenting, 68 Sup. Ct. 221 (U. S. 1947). There a state suit was brought as contemplated under Section 380 and the federal suit stayed to await the outcome of the state suit.

rather than an injunction. Thus, the Supreme Court refused to pass on the merits of challenges by labor organizations against an Alabama statute regulating their activities.[45] While the suits in those cases had been instituted in the state courts, the Supreme Court made it plain that the same rule would apply to such a suit brought in the federal courts.

It seems clear, therefore, that the federal courts can be used to protect constitutional rights only after a doubtful state statute has been defined by the highest state court. Here again the restriction has made the direct appeal to the federal courts largely fruitless. Normally, the way to review the decision of the state court denying a claimed federal right would be to seek direct review of that decision in the United States Supreme Court. There are, of course, circumstances under which perhaps the federal courts might take jurisdiction at the behest of someone who had not been a party to the earlier proceedings. And however restrictive the present rule may be, it is not open to serious objection, because the state court is being called upon to interpret its own statute, not to pass on contested facts. If the interpretation of the statute is such as to prevent denial of federal right then no harm has been done; if the opposite result is reached the question still remains open for the United States Supreme Court to pass on.

DAMAGE SUITS

Since an action at law for damages does not seek to compel future action or to undo the past, it is not subject to any of the restrictions we have been discussing. The question to be determined in such a suit is whether the act complained of violated a federal right. This involves deciding whether the act took place and whether, if it did, a federal right was infringed—an issue of fact and one of law. It is the federal court which determines both questions.

In order to get into the federal court it is, of course, necessary to comply with the jurisdictional requirements of the federal Judicial Code. Either the amount claimed must exceed $3,000 or the case must present one of those special situations in which no jurisdictional amount is required: *i.e.*, it must arise out of a conspiracy to deny equal rights or it must concern an act committed under "color" of state law or custom.[46]

What constitutes such "color" has given rise to much controversy. The law on the subject has been defined chiefly in criminal cases, but is, of course, equally applicable to civil actions for damages. The Supreme Court has definitely ruled that an act is done under color of state law even though not authorized by state law, so

[45] A. F. of L. v. McAdory, 325 U. S. 450 (1945); C. I. O. v. McAdory, 325 U. S. 472 (1945); *cf.* Hill v. Florida, 325 U. S. 538 (1945). Suits for declaratory judgment were allowed, however, in connection with claims for the right to vote in primaries, Ellmore v. Rice, 72 F. Supp. 516 (E. D. S. C. 1947), and in connection with right to a legal education: Wrighten v. Board of Trustees, 72 F. Supp. 945 (E. D. S. C. 1947). Basis for the latter case was of course Missouri *ex rel.* Gaines v. Canada, 305 U. S. 337 (1938), although that was an application for a mandamus, and basis for the former was Smith v. Allwright, 321 U. S. 649 (1944), although that was an action for damages.

[46] See 36 STAT. 1092 (1911), as amended, 28 U. S. C. §41(12), (13), (14) (1940).

long as it is done by state officials purporting to act pursuant to authority given them by law.[47]

Damage suits, of course, have been brought in a great variety of circumstances. The courts have upheld actions of this kind brought for denial of the right to vote for federal office,[48] and also for conspiracy to deny the equal protection of the laws,[49] but not to deny due process.[50]

The Supreme Court was recently confronted with the problem whether or not a suit for damages could be brought for unlawful search and seizure.[51] While, in the particular case, the suit was against federal officials, the same problem might arise concerning state officials. Here the majority of the Supreme Court did not finally pass on the question, but merely ruled that the District Court had jurisdiction to determine it. Chief Justice Stone and Justice Burton believed no right to bring suit existed, since neither the constitutional provision nor any act of Congress afforded a remedy to the person whose rights had been invaded.

The lower federal courts have upheld their jurisdiction in a number of interesting situations. In one case a school teacher sued his principal on the ground that the latter had improperly caused his discharge for absence from duty while serving on a federal jury.[52] In another, a Negro sued to recover damages because he had been denied the right to training as a librarian in a school maintained by a municipality.[53] And a complaint was upheld which sought damages for unlawful arrest where it was alleged that the arrest had been made under color of a state law affecting interstate rendition.[54]

On the other hand, it was held that no basis existed for a suit alleging conspiracy to prevent employment in the WPA, because plaintiff had no "absolute right" to such employment.[55] Nor can a federal court entertain a suit for damages because of failure of state officers to certify the plaintiff as nominee in an election, there being no property right involved.[56] Although a claim was made in that case that the denial of certification was based on discrimination, the court rejected that claim over the dissent of Justices Black and Douglas.

[47] United States v. Classic, 313 U. S. 299 (1941); United States v. Screws, 325 U. S. 91 (1945).

[48] Lane v. Wilson, 307 U. S. 268 (1939): Myers v. Anderson, 238 U. S. 368 (1915).

[49] As in Smith v. Allwright, 321 U. S. 649 (1944), for refusing Negroes the right to vote in a primary.

[50] Mitchell v. Greenough, 100 F. 2d 184(C. C. A. 9th 1938), *cert. denied*, 306 U. S. 659 (1939). But in Refoule v. Ellis, 74 F. Supp. 336 (N. D. Ga. 1947), the court granted a preliminary injunction to restrain infringements of due process such as improper questioning to obtain a confession and harassment by arrest without warrant.

[51] Bell v. Hood, 327 U. S. 678 (1946). Later the District Court held that no cause of action existed under federal law to recover damages because of an unlawful search and seizure, even when the wrongdoers were federal officers. 71 F. Supp. 813 (S. D. Cal. 1947).

[52] Bomar v. Keyes, 162 F. 2d 136 (C. C. A. 2d 1947).

[53] Kerr v. Enoch Pratt Free Library, 149 F. 2d 212 (C. C. A. 4th 1945), *cert. denied*, 326 U. S. 721 (1945).

[54] Picking v. Pennsylvania R. R., 151 F. 2d 240, 152 *id.* 753 (C. C. A. 3d 1945).

[55] Love v. Chandler, 124 F. 2d 785 (C. C. A. 8th 1942).

[56] Snowden v. Hughes, 321 U. S. 1 (1944), *cf.* Saunders v. Wilkins, 152 F. 2d 235 (C. C. A. 4th 1945), *cert. denied*, 328 U. S. 870 (1946).

In one respect the law might well be changed with regard to damage suits. There seems no reason why vindication of constitutional rights in the federal courts should depend upon the amount involved where civil liberties are at issue, whatever may be the propriety of keeping small property claims out of these courts. Congress has already recognized the soundness of this principle in certain sorts of civil liberties cases. It should extend the right of direct resort to the federal courts to all civil liberties cases arising out of the federal Constitution, regardless of the amount in controversy.

CRIMINAL PROSECUTION

In addition to the civil remedies open to aggrieved individuals themselves, there is always the possibility that the aid of the prosecuting arm of the federal government may be invoked. Since Attorney General Murphy set up a Civil Rights section in the Department of Justice, action in this field has been coordinated. In consequence there has been a considerable increase in the number and extent of federal prosecutions. Unfortunately, the area within which these can be conducted is a narrow one.

Federal prosecution for violation of civil rights rests, in the main, on laws enacted to implement the post-Civil War amendments to the Constitution, the Thirteenth, Fourteenth, and Fifteenth. The first of these laws was the Enforcement Act of 1870.[57] Although most of its provisions were repealed,[58] several sections still remain. One of these[59] punishes as a crime any conspiracy to deprive a citizen of rights or privileges secured by the Constitution or laws of the United States. While this section protects only citizens and applies only to conspiracies, it is not limited to action by state officers.[60] Another provision still in effect[61] protects all persons and is not restricted to conspiracies, but it can be invoked only when the accused has acted under color of a state law or custom. The third provision also still in existence[62] punishes interference with the right to vote because of race or color. Congress has also passed laws punishing peonage,[63] which are applicable to private persons as well as to state officials.[64]

Since the Civil Rights Law does not specify what federally secured rights are

[57] 16 STAT. 140 (1870), 36 STAT. 1092 (1911), 28 U. S. C. §41(11) (1940).

[58] 28 STAT. 36 (1894), 36 STAT. 1096 (1911), as amended, 39 STAT. 532 (1916), 28 U. S. C. §74 (1940), 35 STAT. 1153 (1909), 18 U. S. C. §§572, 573 (1940).

[59] 35 STAT. 1092 (1909), 18 U. S. C. §51 (1940). See MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 28-47 (1947).

[60] United States v. Ellis, 43 F. Supp. 321 (W. D. S. C. 1942).

[61] 35 STAT. 1092 (1909), 18 U. S. C. §52 (1940). See MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 47-73 (1947).

[62] REV. STAT. §2004 (1875), 8 U. S. C. §31 (1940).

[63] REV. STAT. §1990 (1875), 8 U. S. C. §56 (1940); 35 STAT. 1138 (1909), 18 U. S. C. §421 (1940).

[64] Pierce v. United States, 146 F. 2d 84 (C. C. A. 5th 1944), *cert. denied*, 324 U. S. 873 (1944).

protected against interference, it was argued, in *Screws* v. *United States*,[65] that the law was too vague to be enforced. The majority of the Supreme Court ruled otherwise. Mr. Justice Douglas pointed out that these rights had become defined by successive decisions of the court. It had been settled that for a state officer to maltreat a person after his arrest was a denial of due process.[66] Therefore, any state officer who committed such an act in the knowledge it was wrong could be punished. But it was necessary to establish that the violation of right had been willful. The majority, therefore, reversed the conviction, since they believed the jury had been insufficiently instructed. Three of the justices (Roberts, Frankfurter, and Jackson) thought that the indictment should have been dismissed altogether, both because the statute was too vague and because the acts complained of had not been committed under color of state law. Justices Rutledge and Murphy thought that the conviction should have been affirmed, but Justice Rutledge concurred with the decision of the four justices who thought there should be a new trial only because, otherwise, the case would remain undisposed of. Both these justices maintained there could be no doubt the state officials knew they had no right to do what they did. Mr. Justice Murphy pointed out that the question of the sufficiency of the judge's charge had not been raised in the lower courts and that there was no need for any explicit charge on the subject of willfulness.

The effect of the majority decision has been unfortunate, because the stress on the necessity for willful violation of constitutional rights makes it easy for a judge unsympathetic to the the prosecution to induce a jury to acquit. This is what actually happened on the retrial of the *Screws* case.

Existing law would be much improved by the simple enactment that all interferences with federally secured rights are criminal, replacing the present law which condemns only those resulting from conspiracy and those carried out under color of state law. This change would not, of course, be very far-reaching; but there is no reason for not making it. Congress could also strengthen the present laws dealing with the suffrage, particularly by making it an offense to interfere in any way with presidential elections (to overcome a lower court's ruling[67] that existing laws do not cover these). Specific legislation may also be desirable in order to broaden the base for dealing with primary elections, a base now somewhat limited by the Supreme Court in the *Classic* case.[68]

Congress might further use the commerce power both by prohibiting segregation by interstate carriers and by prohibiting discrimination by labor unions or employers engaged in interstate commerce.

It has been suggested that it might be easier to obtain convictions if the Civil

[65] 325 U. S. 91 (1945).

[66] Culp v. United States, 131 F. 2d 93 (C. C. A. 8th 1942); Catlette v. United States, 132 F. 2d 902 (C. C. A. 4th 1943).

[67] Walker v. United States, 93 F. 2d 383 (C. C. A. 8th 1937), *cert. denied*, on appeal of defendants, 303 U. S. 655 (1938).

[68] 313 U. S. 299 (1941).

Rights Law were amended so as to avoid the necessity of persuading juries that the defendants have willfully sought to invade constitutional rights. This could be accomplished in two ways: by simply deleting the word "willful" from the statute, or by replacing the present law with a new one making it a crime to violate certain specific rights. The opinions in the *Screws* case[69] cast grave doubt upon the constitutionality of the first proposal. The second would no doubt remove the argument that the law is too vague to be enforceable, an argument which led the majority of the Supreme Court to insist the offense must be a willful one. Such an amendment would specify precisely those federally secured rights, interference with which would constitute a crime. The suggestion is persuasive, but not, I think, sound. For, while specific laws might produce more convictions for the particular offenses described, necessarily there would be others left out, either because Congress had not thought of them at the time or because of the difficulty of obtaining Congresssional agreement that they should be included.

CONCLUSION

It should be borne in mind that modern experience shows us the courts are not always the best instruments for securing civil rights. Even in relatively enlightened states, such as New York, conventional methods of law enforcement by civil suit or criminal prosecution have proved ineffective. And when the legislature of New York decided to do something effective about discrimination in employment it used the administrative procedure already found useful in the field of labor relations. Congress may follow suit and create a permanent Fair Employment Practices Commission. Later similar machinery may be established to deal with other areas of discrimination, such as housing and education. Administrative methods may even come to be applied to the elusive subject of restrictions on voting. In all these fields action by administrative agencies should be much more effective than the haphazard results obtainable from the privately maintained law suit.

If the shift to administrative action occurs in these large areas of civil liberties, then the role of the lower federal courts as fact finders will diminish. Yet their role as interpreters of the law and as guardians of fair procedure will always remain, subject, of course, to the final say of the Supreme Court. Indeed, in dealing with questions of the procedure of state courts, the function of the lower federal courts may even be increased if, as suggested, they are given power to pass on the facts when a claim of wrongdoing by state officials is made. However their scope be changed, they will continue to exercise an important function in assuring that the states respect the provisions of the federal Constitution and the laws which protect the civil rights of the individual.

[69] 325 U. S. 91 (1945).

THE INFLUENCE OF FEDERAL PROCEDURAL REFORM

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The recent reforms of procedure in the federal courts are unique not merely because of their advanced features, but also because they were professional reforms accomplished under professional auspices. This fact would not seem strange, did we not recall that in the past such changes have been forced upon the profession either by aroused lay feeling or by the determined sponsorship of some lone leader or by both. The century-long struggle in England, where the names of Bentham and Dickens figure so prominently, was largely lay-inspired. In American code reform—the foundation for modern civil procedure in England and America—the name of David Dudley Field towers in lonely eminence. His accomplishment, indeed, seems almost a tour de force, so quickly was it achieved; but then it had to run the gauntlet of court adjudication and unfortunate emasculation. In the classic statement of Chief Justice Winslow of Wisconsin, "The cold, not to say inhuman, treatment which the infant Code received from the New York judges is matter of history."[1] Lawyers look to precedent and to the past; the habit of violent reaction against change is too firmly ingrained not to be recognized as a natural condition of procedural reform.[2] But it is still possible for the profession to supply both effective leadership and expert execution of such projects. This was recognized by the leading figures of the American bar who conducted the long doubtful, but ultimately successful, campaign for court rule-making in the federal courts. And the reforms when secured now stand as successful models of practice systems developed by professional efforts and according to professional standards. This achievement,

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[1] McArthur v. Moffett, 143 Wis. 564, 567, 128 N. W. 445, 446 (1910), adding: "They had been bred under the common-law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to import into the Code rules and distinctions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators." See also CLARK, CODE PLEADING 17-71, 83, 84 (2d ed. 1947); Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725 (1926).

[2] Fowler, *A Psychological Approach to Procedural Reform*, 43 YALE L. J. 1254 (1934); authorities cited note 1 *supra*.

therefore, is an event in American judicial history. Interest in it in the states, with a view to its possible emulation, makes desirable some account of the way it occurred, and the teachings it may offer for other attempts.

In a brief survey it will not be possible to discuss or emphasize all the interesting problems to which the federal experience has brought light and understanding. I shall limit myself in the main to the reform of civil procedure, making only incidental references to the more recently achieved reform of criminal procedure. My experience and acquaintance has been with the former; and this surmounted the original obstacles and smoothed the way for the latter. But no invidious comparison is suggested; it is the crowning glory of the federal reform that it has been so thoroughly and effectively extended throughout the whole system.[3] Further, I shall attempt a brief history of the reform movement against the background which made it inevitable and the obstacles necessary to be overcome, the actual experience of drafting and promulgating the rules, some of their more important characteristics, and finally the lessons we may learn from them as to future reforms elsewhere. My own participation in the agitation for the change, particularly for the union of law and equity, and in the drafting of the rules, as reporter and member of the Advisory Committee, makes me hardly an impartial observer. But even though my own enthusiasm for the rules may thus require some discounting, the course of judicial and professional opinion and decision appears to demonstrate the success of the reform so thoroughly that I think we may take it as accepted fact in our further discussion of reasons and consequences.[4]

I

EARLY FEDERAL PROCEDURE AND THE STRUGGLE FOR THE RULE-MAKING AUTHORITY

The procedure in the federal courts, like those courts themselves, represented a compromise of views upon the part of our founding fathers. Differences in view between the nationalists, desiring the support of a strong court system for a central government, and the federalists, desiring only a generally loose federation of independent states, were settled by authority to the Congress to establish trial courts of definitely restricted jurisdiction. And this authority was only sparingly exercised for many years; thus the general grant of jurisdiction over federal questions dates only from 1875.[5] Meanwhile, not unnaturally the procedure in actions at law was

[3] For references see Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L. J. 694 (1946), with bibliography 697, 698; II *id.*, 56 YALE L. J. 197 (1947); FEDERAL RULES OF CRIMINAL PROCEDURE, WITH NOTES AND INSTITUTE PROCEEDINGS (N. Y. U. School of Law, 1946), with bibliography 306-308; Strine, *The New Federal Criminal Rules in Action*, 8 FED. B. J. 190 (1947); Freed, *The Rules of Criminal Procedure: An Appraisal Based on a Year's Experience*, 33 A. B. A. J. 1010 (1947).

[4] In this article I have made frequent use of the material I have presented in CLARK, CODE PLEADING (2d ed. 1947) *passim* and particularly at 23-45, 50-71. Hence for the sake of brevity, and to avoid unnecessary duplication, I have limited many of my references in the footnotes below to citation of this book, instead of repeating the fuller documentation there given.

[5] Clark and Moore, *A New Federal Civil Procedure—I. The Background*, 44 YALE L. J. 387 (1935); Warren, *Federal Process and State Legislation*, 16 VA. L. REV. 421 (1930); Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303 (1936); 1 MOORE, FEDERAL PRACTICE 109, 476, 502 (1938).

made to conform to that of the state courts where the federal courts sat. Earlier this was as of stated points of time necessarily already past at the time of the enacting statutes; but under the famous Conformity Act of 1873, there was established the principle of continuing conformity "as near as may be" to the local practice of the state wherein the federal court was sitting.[6] Though this avoided the earlier difficulty of applying often a procedure already superseded locally, it was highly unsatisfactory. Federal jurisdiction and substantive law required a specialized approach in any event. This specialization was increased by continuing reforms by Congress of details of procedure covering matters all the way from leave to amend to the filing of equitable defenses. Such a combination of required diversity, superseded in many details by an imposed uniformity, resulted in unique features from district to district, so that federal practice became a matter for the expert, and for the local expert at that. As procedure became more and more simplified in many of the states the demand for reform became insistent.[7]

Meanwhile there was at hand in the federal courts of equity an outstanding example of a contrary practice. The conformity principle had not reached to chancery procedure, partly because of its lessened importance, or nonexistence, partly because of the tradition of court control of chancery practice in England. Hence by their very unobtrusiveness these courts fared better in the federal system than did the courts of law.[8] The Supreme Court began modestly to provide limited rules, which were added to from time to time, so that the principle of court control came to be embodied in the statutes. Under the statutory control granted, the Supreme Court had drafted the Equity Rules of 1912, which provided an advanced and flexible practice following English models. The contrast between the uniform equity rules of simple character and the complexities of conformity at law was therefore most striking. In 1915 Congress passed the Equitable Defense Statute, providing for the pleading of equitable defenses in actions at law; and this law was supplemented by court rules providing in substance for the transfer of cases between the equity and law sides of the single federal district court. The whole ancient dichotomy of law versus equity had become more a matter of form than of substance. Yet the problems of form were obtrusive, so much so that many cases seemed to indicate as a consequence of the continued separation only the necessity of vindicating purely formal rules.[9]

Sporadic pressure for reform received an impetus with the organization of the American Bar Association in 1878, which almost at once turned its attention to the problem. Thus as early as 1886, David Dudley Field was urging it to act.[10] The

[6] CLARK, CODE PLEADING 31-34 (2d ed. 1947); Tolman, *The Origin of the Conformity Idea, Its Development, the Failure of the Experiment, etc.*, 23 A. B. A. J. 971 (1937).

[7] *Ibid.*; authorities cited note 5 *supra*.

[8] Clark and Stone, *Review of Findings of Fact*, 4 U. OF CHI. L. REV. 190, 192-199 (1937); note 5 *supra*.

[9] Clark and Moore, *op. cit. supra* note 5; Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORN. L. Q. 443 (1935).

[10] 9 A. B. A. REP. 503, 551 (1886); *cf.* 10 *id.* at 317 (1887); 11 *id.* at 63, 79 (188); CLARK, CODE PLEADING 34 (2d ed. 1947).

movement achieved definite form in 1912 when the Association created its Committee on Uniform Judicial Procedure to secure authority for the drafting of uniform rules by the Supreme Court. Its chairman for many years, Thomas W. Shelton of Norfolk, Virginia, was a leading factor in dramatizing the cause, even though he did not live to see the consummation of his efforts.[11]

The initial program embraced only procedure in law actions, supplementing existing rule-making authority in equity. But in 1922 the Association, under the urging of Chief Justice Taft, added another section to its proposed bill to provide for the uniting of the law and equity procedures.[12] This was a wise and necessary step. The support of the great code states could hardly be secured for the comparatively minor reform of separate, even though improved, procedures, in two opposing federal systems. Unfortunately, as we shall see, the drafting skill shown in this reform did not equal the zeal of the reformers; the second section remained rather an addendum than an integrated part of the entire bill, and the conflicts and omissions between the sections have caused and are still causing some problems in continuing rule making after the achievement of the initial reform.[13]

Though the committee enlisted the support of many of the most distinguished leaders in the profession, there was determined opposition. Its spearhead was the late Senator Walsh, member of the powerful Senate Judiciary Committee and himself an antagonist of fiery and sincere persistence. His was the fear of a complicated metropolitan procedure to be foisted upon what he considered the simple practice known in the western states. Actually there was some ground for his fear; the Senator could point to the complications and vicissitudes of New York practice as proving his point. But his twin premises, that conformity could achieve for the federal courts the simpler practice of his own Montana while uniformity must mean the diversities of New York practice, were hardly justified, as events were later to prove. Nevertheless his long and dramatic opposition did have the effect of highlighting the need of a simple system in order to gain respect and support for the change. Thus it aided in assuring a better result when the reform finally came.[14]

With the death of Mr. Shelton in 1930 the reform movement, so far as the Bar Association was concerned, lost its vitalizing force. The committee was kept alive for a couple of years until, on the report of a district judge, himself opposed to change, it was allowed to disband on the ground that further effort would be use-

[11] CLARK, CODE PLEADING 35 (2d ed. 1947), with citations to committee reports; 24 A. B. A. J. 97 (1938).

[12] Now §2 of the enabling act, 48 STAT. 1064 (1934), 28 U. S. C. §723c (1940); the earlier provision for rule making at law became §1, 28 U. S. C. §723b. See Taft, *Three Needed Steps of Progress*, 8 A. B. A. J. 34, 35 (1922); Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A. B. A. J. 601, 604, 607 (1922); 47 A. B. A. REP. 250, 259-261, 268 (1922); *cf.* also his suggestion in 1914, 39 A. B. A. REP. 381.

[13] See *infra;* CLARK, CODE PLEADING 41-45 (2d ed. 1947).

[14] See committee reports by Senator Walsh cited by Clark and Moore, *supra* note 5; Walsh, *Rule-Making Power on the Law Side of Federal Practice*, 13 A. B. A. J. 87 (1927); CLARK, CODE PLEADING 35, 36 (2d ed. 1947).

less. In 1933 Senator Walsh died suddenly just before he could assume the duties of the attorney generalship in President Roosevelt's first cabinet. His successor there was Homer Cummings of Connecticut, who undertook a program of reform involving both the civil and the criminal law and, in the course of it, in March, 1934, caused to be introduced the identical bill which the American Bar Association had so long and so unsuccessfully fostered. Within the short space of ninety days he had, practically singlehanded, secured the adoption of the measure, on June 19, 1934. His has been a proper pride in so quickly accomplishing a reform beyond the reach of the organized Bar, and an opportunity, of which he has not failed to avail himself, of chiding the distinguished lawyers upon their failure to realize the importance of political skill in effecting reform.[15] Doubtless here is one of the most important lessons for emulators of the federal success.

II

THE DRAFTING OF THE RULES

The first steps in executing the statute were undertaken by Attorney General Cummings, who appointed a staff and supervisory committee with the announced objective of drafting uniform rules at law corresponding to the already existing equity rules. But this seemed only a partial realization of what had become a settled program since Chief Justice Taft's inspiring leadership of the movement in 1922, and there was agitation for the more extensive reform of the union of law and equity, so familiar a part of state code procedure.[16] This appears to have been persuasive to the Supreme Court, for the next year it decided on two most important principles: (1) that it itself would accept the responsibility given it by the statute and would undertake the reform, acting upon the advice of an Advisory Committee which it would appoint, and (2) that it would adopt the more complete program of uniting the law and equity procedures.[17] It immediately asked former Attorney General William D. Mitchell to serve as chairman of its proposed committee and through him received suggestions for the membership of the committee, to include both active federal practitioners and law school teachers. On June 3, 1935, the Court embodied its program in a formal order appointing a committee of fourteen, representing all parts of the country and the diverse shades of experience just indicated.[18]

[15] See the several addresses cited in CLARK, CODE PLEADING 35, 36 (2d ed. 1947), which gives references for this history; Cummings, *Modernizing Federal Procedure*, 24 A. B. A. J. 625, 885 (1938). The statute is cited in note 12, *supra*.

[16] Including the articles by Professor Moore and the author cited in notes 5 and 9, *supra*. As an item of unpublished history, it may be stated that a letter from former Attorney General Mitchell to the Chief Justice, stating most cogently the reasons for the full reform, undoubtedly helped mightily in persuading the Court both of the desirability of the full reform and of Mr. Mitchell's ability to shape its course. The ultimate success of the reform was due in no small measure to his unique contribution of informed and forceful leadership as chairman of the Court's Advisory Committee.

[17] First announced by the Chief Justice at the meeting of the American Law Institute, May 9, 1935, 55 Sup. Ct. xxxv-xxix (1935), 21 A. B. A. J. 340 (1935).

[18] 295 U. S. 774 (1935); see also 297 U. S. 731 (1936).

Since that initial step the Court has assumed all responsibility for the task, and has acted assiduously to show its recognition of its statutory obligation. Immediately it caused all work to be removed from other governmental departments, and the office of the committee to be located in the Supreme Court building itself. It has supervised the work of the committee in all details, including the appointment of research assistants and the expenditure of the appropriations made by Congress for the purpose. And its final consideration has been more than perfunctory, as is shown by its elimination of certain proposed rules in its original action in 1937 and its order approving amendments in 1946.[19] The same sense of responsibility was shown by the Court in connection with the federal rules of criminal procedure authorized by later acts of Congress. Following the model of the civil reform, it appointed an advisory committee, which after some years' effort carefully prepared a report in the light of professional criticisms and the best experience and advice available. This the Court adopted with some modifications in 1944, and the criminal rules became finally effective March 21, 1946.[20]

The leadership of the Court has been invaluable in securing the success of the rules. No other professional group in the federal system possesses a like prestige or a like power to give vitality to such a reform. Suggestions that rule making be placed under the aegis of other bodies, of which almost the only one available appears to be the Conference of Senior Circuit Judges, would call for the sacrifice of this stimulus and this guarantee. This apparently has been the conviction of the great majority of the justices, though Justices Brandeis, Black, and Frankfurter have declined to concur in certain of the rule-making orders. The objections were made articulate by Justice Frankfurter in his memorandum with reference to the rules of criminal procedure.[21] They concerned the capacity of the Court itself, and suggested that the justices lacked both time and expertness for the task. But the device of an advisory committee would appear to supplement adequately the Court's own facilities for expert study and knowledge by experience; and this seems to be the teaching of experience. The very success of the experiment to date is proof that the method is sound. Justice Frankfurter's more recent action in approving amendments to the civil rules "essentially because of his confidence in the informed judgment" of the Advisory Committee appears to be a recognition of this fact.[22]

[19] In its original order, Dec. 20, 1937, 302 U. S. 783 (1937), the Court omitted two proposed rules, as to one of which the committee had expressed some doubt of the Court's power to act. 1 MOORE, FEDERAL PRACTICE 44-48; 2 *id.* at 2500-2501, 3 *id.* at 3073-3076, 3690-3692 (1938). In its later order, Dec. 27, 1946, 329 U. S. 843 (1946), it approved all the recommended amendments except three, which concerned matters then before the Court. See note 27, *infra.*

[20] Order of Dec. 26, 1944, 323 U. S. 821 (1944), as to the rules reported to Congress; order of Feb. 8, 1946, 327 U. S. 825 (1946), for the rules not so reported. The anomalous distinction thus required in adoption of the same set of rules is discussed note 29, *infra.* See also authorities cited note 3, *supra.*

[21] 323 U. S. 821-823 (1944). Compare critical comments in 31 A. B. A. J. 136, 163 (1945), and by Messrs. Cummings, 31 A. B A. J. 236, 238 (1945), and Dession, *supra* note 3, 55 YALE L. J. 694, 698 (1946).

[22] 329 U. S. 843 (1946); compare also the Court's order of Jan. 17, 1938, 302 U. S. 783-785 (1938), expressing appreciation of the committee's work and of the rules as drawn. These orders, together with that of Feb. 8, 1946, *supra* note 20, were all actions of the entire Court.

Perhaps a further assurance that the work of rule making will be at least devotedly performed, and with all the competence that the individuals engaged upon it can bring to the task, is found in the undoubted interest in the work. As a member of the committee, I can testify that no professional activity was ever more stimulating, and none approached it in arousing the excitement of all participants. Usually a drafting process calls for tedious effort where the labors of only one or a few individuals come to be a dominating force. But this was not the case here. All lawyers love to battle over court procedure, and the high nature of the responsibility placed upon the individual members heightened the interest. Long hours and lengthy days of conference seemed to cause no abatement of enthusiasm. And there is no doubt that the members of the committee grew in knowledge and understanding of the subject, and in unity of view, as the work progressed. At first the widely divergent views, based on the varying backgrounds and types of experience represented, seemed to make final agreement doubtful. But increasingly the fundamental similarities of objectives of all conflicting systems and the lessened importance of the surface differences were borne in upon the committee. Moreover, the program of submitting drafts of rules to the profession for criticism and suggestion proved its value, for when the time for final decision arrived the committee was fortified by a pretty wide view of the professional thinking upon the various topics. And so the committee achieved the further unique result of not merely apparent, but real, unanimity in its various reports.[23]

In drafting the original rules the committee's activities continued from its organization in June, 1935, until its report to the Court in the fall of 1937. A reporter's staff for research and drafting was immediately organized, and tentative drafts were presented to the committee at regular conferences beginning in the fall of 1935. The committee with the Court's approval caused to be printed for comment and criticism a "Preliminary Draft" in May, 1936, and a "Report" in April, 1937; then it submitted its Final Report to the Court in November, 1937.[24] The Court approved the report, with certain limited exceptions, on December 20, 1937, and the rules as adopted were presented to Congress by Attorney General Cummings at the Court's request at the opening of the Seventy-fifth Congress. No opposing action having been taken by that body, the rules became effective, according to their terms, three months after adjournment, or on September 16, 1938.[25]

In 1939 the Court made the rules applicable, so far as not inconsistent with statutes, in bankruptcy and copyright matters; it also asked the committee to sub-

[23] The only noted (and actual) case of dissent, REPORT OF PROPOSED AMENDMENTS 46 (June, 1946), was that involving the much controverted question of discovery of lawyers' files, by one member, who, because of illness, had not had the benefit of the thorough discussion and exploration of the issues at the committee's meetings and who died before the Court acted as pointed out in notes 27, 48, *infra.*

[24] For references to these documents and the various articles upon and discussions of the drafts, see CLARK, CODE PLEADING 36, 37 (2d ed. 1947), and a series of articles by the writer in 22 A. B. A. J. 447, 787 (1936), 23 *id.* at 976 (1937), 23 WASH. U. L. Q. 297 (1938), 15 TENN. L. REV. 551 (1939).

[25] 302 U. S. 783 (1937), *supra* note 19; 308 U. S. 645-788 (1938), giving the text of the rules. For the discussions in Congress, see CLARK, CODE PLEADING 37, 38 (2d ed. 1947).

mit amendments. Moreover, the Court, upon the committee's recommendation, adopted a slight change in a single rule, which became effective the following year, after it had been reported to Congress, constituting a precedent both for the authority to amend the rules as needed and for the procedure thereunder.[26] In 1942 the Court reconstituted the committee to consider the recommendation of amendments; and after several conferences and the submission of two preliminary drafts for criticism in accordance with the procedure originally established, the committee presented its report to the Court in the fall of 1946, recommending a series of amendments. Again the Court adopted all the proposals except three, which involved issues before the Court in pending cases.[27] The amendments were reported to the Eightieth Congress at its opening session in January, 1947. Since no move has been made in Congress to question them, they will become effective, acccording to their terms, three months after Congress has adjourned. This date, left somewhat in doubt when Congress first "adjourned" to January 2, 1948, unless sooner recalled by its majority leaders, was made certain when, after the resumption of the session in November, 1947, both houses adjourned sine die on December 19, 1947.[28]

That there may be such a prolongation of the rule-making process, for reasons of state entirely unconnected with it, is a striking demonstration of its present unfortunate rigidity under the enabling act as currently construed. The writer with others has urged that the requirement for reporting to Congress found in the Act's second section applies only to the one matter there covered, namely, the union of law and equity, and that, this once having been achieved, further changes in the rules would be subject only to the normal procedure of the first section, *i.e.*, promulgation of the rules by the Court six months before they become effective. As a gesture of courtesy the reporting to Congress by the Court may be desirable; and if its formal statement as a legal requirement is thought necessary, a simple requirement for such reporting two or three months before the effective date of the rules would be quite adequate. But the presently assumed requirements are a deadening influence upon the process. The holdings that the rules must be reported at the opening of a regular session of Congress (and that, too, by the Attorney General, who has not participated in the rule making in any way) and that they shall remain there until

[26] 305 U. S. 681, 698 (1939); 307 U. S. 652 (1939); 308 U. S. 641, 642 (1939).

[27] 329 U. S. 839-878 (1947), giving the text of the amendments; for the order requesting the members of the committee again to serve, see 314 U. S. 720 (1942); and compare Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A. B. A. J. 521, 525 (1942). Of the three amendments not approved, one involving discovery of lawyers' files was substantially incorporated in the Court's later decision, cited note 48, *infra*. Decisions involving the substance of the other two interpreted existing law as being contrary to the committee's recommendations. Anderson v. Yungkau, 329 U. S. 482 (1947); Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212 (1947).

[28] 93 Cong. Rec. 11843, 11888 (Dec. 19, 1947). The three months' delay after adjournment is provided by the amendment which forms Rule 86(b), 329 U. S. 839, 875 (1947), 6 F. R. D. 249, making the effective date March 19, 1948, as was forecast in a learned memorandum by the Legislative Reference Service of the Library of Congress for the Senate Committee on the Judiciary, to be found in 93 Cong. Rec. 10696 (Nov. 17, 1947), and in a Committee Print, Dec. 1, 1947. In accord are Ashley v. Keith Oil Corp., 10 Fed. Rules Serv. 86b.21, Case 1 (D. C. Mass. 1947); United States *ex rel.* Hirshberg v. Malanaphy (C. C. A. 2d Jan. 12, 1948) (without opinion).

the close of Congress mean, as events have developed in recent years, that the rules must be reported early in January and become effective only in March or April of the following year. The reporting date is a difficult one for the profession, the Advisory Committee, and the Court, for all these bodies are likely to be heavily engaged in performance of their more immediate obligations upon return from the long summer vacation in the fall. To forestall unavoidable delays the deadline for action should be set for May or June, rather than for late December. Moreover, the long delay in the effective date of even the simplest amendments—thus requiring from two to five years—substitutes rigidity for flexibility in control of rule making. States which have looked with favor upon federal rule making should be warned against the dangers of accepting the enabling act in toto.[29]

The nature of the amendments which were adopted is in itself important testimony to the success of the original rules and their ready acceptance by the profession. For the amendments made no major change in the fundamentals of practice. Except for a few changes, such as the one which reduced the time of appeal from three months to thirty days, they were designed only to clarify the original purpose and to explain or amplify that purpose. Almost a decade of experience had shown no fundamental weakness in the system established.[30]

III

SUCCESS OF THE RULES

The success of the new system thus established is thoroughly conceded. In the light of the opposition to such reforms in the past, and the often successful efforts to obliterate their effect, the universal chorus of approval is quite phenomenal. Decisions, texts, articles, addresses, law school courses—all attest to this. Most important are the activities of the courts themselves. Here the application of the rules by the judges has been uniformly enthusiastic. Universally the courts have expressed the intent of carrying out the principles of simple, effective procedural control stated in the rules themselves. Decision after decision reiterates this conception. Even if we might find occasion here and there to challenge a particular result, nevertheless the general good will of the bench towards the system is thoroughly demonstrated. Many judges of long experience have commented especially upon not merely the worth of the rules themselves, but the invigorating spirit they have aroused in the

[29] For discussion with citations, see CLARK, CODE PLEADING 41-45 (2d ed. 1947). The situation as to the rules of criminal procedure is particularly anomalous, since these rules are authorized by several statutes conflicting in this aspect. CLARK, CODE PLEADING 45 (2d ed. 1947). See also 3 MOORE, FEDERAL PRACTICE 3448-3452; Armstrong, *Proposed Amendments to Federal Rules for Civil Procedure*, 4 F. R. D. 124, 137 (1946); *cf.* Sibbach v. Wilson & Co., 312 U. S. 1, 15, 18 (1941); 83 CONG. REC. 12841-12842 (1938). For the contretemps as to the effective date of the recent amendments, see note 28 *supra*.

[30] This is the tenor of the comment upon the amendments, particularly in the articles by ex-President Armstrong of the A. B. A., 5 F. R. D. 339, 359 (1946), 28 U. S. C. §§721-723 (1947 Spec. Pamphlet), also in 4 F. R. D. 124 (1946), 31 A. B. A. J. 497 (1945); for other citations, see CLARK, CODE PLEADING 39 (2d ed. 1947).

judiciary. This is the most substantial, as it is the most heartening, achievement of the reform.[31]

Beyond the actual decisions in the cases is the published comment to the same effect. Federal procedure is now taken as basic in law courses, and the teaching materials are shaped to it. The amount of literature stimulated by the reform, as shown by the published bibliographies, almost overwhelms.[32] Among encomia we find such statements as that the rules represent "one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law,"[33] or the more restrained statement from a distinguished jurist of many years' experience in a large metropolitan area, "I have yet to note an instance in which they have been found lacking."[34] The late Chief Justice Stone's own enthusiastic comments pictured the system as "concise, simple, adaptable, and efficient," and the rules as "highly successful in operation."[35]

Direct criticisms of the system as a whole, almost nonexistent at the beginning, seem not to be repeated now.[36] There are, of course, some disputes over particular rules; and the preference still considerably expressed for local procedures with "improvements" is, so far forth, a refusal to accept the federal system completely. Both of these far from unnatural developments are discussed below because of their importance to the future spread of the system. But as to the first, it should be pointed out that the problems arise mainly as to the newer procedural devices, such as discovery of lawyers' files, summary judgments, or third-party practice, rather than the fundamentals of the system.[37] And as to the second, the view usually rests upon an instinctive but, it is believed, not thoroughly analyzed reaction that for the most part accustomed state procedure is more adapted to the local bar than would

[31] Specific decisions are far too numerous to cite; the pages of the successive volumes of the Federal Rules Decisions and the Federal Rules Service abound in illustrations; these volumes, especially the former, contain numerous articles and addresses of like tenor by federal judges. An early expression of this point of view is found in S. E. C. v. Timetrust, Inc., 28 F. Supp. 34, 41, 42 (N. D. Cal. 1939). At times in the early decisions, this point of view was expressed to lead to a result contrary to the more settled conclusion as later developed. *Cf.* Teller v. Montgomery Ward & Co., 27 F. Supp. 938 (E. D. Pa. 1939); Westland Oil Co. v. Firestone Tire & Rubber Co., 3 F. R. D. 55 (D. N. D. 1943); CLARK, CODE PLEADING 342-344 (2d ed. 1947).

[32] There are already many extensive bibliographies of articles; for citations see CLARK, CODE PLEADING 39, 40 (2d ed. 1947). Among school casebooks emphasizing the rules, see PIKE, CASES AND OTHER MATERIALS ON NEW FEDERAL AND CODE PROCEDURE (1939); DOBIE AND LADD, CASES AND MATERIALS ON FEDERAL JURISDICTION AND PROCEDURE (1940); MCCORMICK AND CHADBOURN, CASES AND MATERIALS ON FEDERAL COURTS (1946); CLARK, CASES ON PLEADING AND PROCEDURE (2d. ed. 1940).

[33] Carey, *In Favor of Uniformity*, 18 TEMP. L. Q. 145 (1943), 3 F. R. D. 505, 507, part of a report showing strong support for the rules among lawyers, law teachers, and bar associations.

[34] Chesnut, *Improvements in Judicial Procedure*, 17 CONN. B. J. 238, 243 (1943).

[35] 1 THE RECORD 144, 150 (1946). See also Justice Burton's address before the American Bar Association, 33 A. B. A. J. 1099, 1166, 1167 (1947).

[36] Thus among early critics were McCaskill, *One Form of Civil Action, But What Procedure, for the Federal Courts*, 30 ILL. L. REV. 415 (1935), whose objections may perhaps be continuing; *cf.* McCaskill, *Against Uniformity*, 18 TEMP. L. Q. 145, 3 F. R. D. 505, 508 (1943), and note 43 *infra;* and Judge Fee, *The Proposed New Rules for Uniform Procedure in the Federal District Courts*, 16 ORE. L. REV. 103 (1937); but Judge Fee's decisions applying the rules have been quite in their spirit.

[37] Discussed briefly *infra.*

be a complete reform.[38] Occasionally, however, there is added the thought that the mere number of federal rules decisions suggests a failure of the rules to solve the "pleading problem"[39]—a suggestion which overlooks the vast number of merely confirmatory decisions by judges imbued with the new spirit and the American business ingenuity which makes any form of judicial utterance, even on a minor procedural point, a valuable commercial asset.

If, however, this reform is to become a workable example for other jurisdictions, it is necessary to analyze and understand the reasons which have led to its ready acceptance in the federal courts, and which may operate either not at all or with lessened weight as support of state acceptance of a like system. But in any event many may be duplicated with foresight and planning. It seems well therefore to devote some attention, first, to the characteristics of the rules which have brought forth so favorable a reception and, second, to the details of the federal rule-making process in order to envisage those features which may be considered unique and those which may well be duplicated elsewhere.

IV

CHARACTERISTICS OF THE RULES AS ADOPTED

The cornerstone of the new reform is a system of simple, direct, and unprolonged allegations of claims and defenses by the litigants, resting, in turn, upon a blending of the old law and equity systems and upon the concept of a civil action inclusive in content of all points of dispute between the parties. This keys the entire reform. It is in effect a de-emphasis upon pleading as a controlling element in decision and a subordination of procedure to its proper position as an aid to the understanding of a case, rather than a series of restrictions on the parties or the court.[40] It was achieved by employing the more tested devices under the best of English and American practice, by discarding some of the ancient circumlocutions of statement, by limiting the pleadings in number as well as in character and detail, and finally by a simple set of forms "intended for illustration only," but designed, as the rules themselves

[38] This appears in the articles which have appeared supporting limited reform in states such as Iowa, Missouri, and Texas, discussed *infra*, or in the article by Professor Rothschild and the committee report cited note 39, *infra*. I have stated my criticisms of this approach elsewhere: *Dissatisfaction with Piecemeal Reform*, 24 J. AM. JUD. SOC'Y 121 (1940), *The Texas and the Federal Rules of Civil Procedure*, 20 TEX. L. REV. 4, 5 (1941), and my CODE PLEADING 47-49, 51-53, 63, 64 (2d ed. 1947).

[39] Rothschild, *Reformulating the Jurisdiction of the Court of Appeals*, 13 BROOKLYN L. REV. 14, 16, 17 (1947); *Rep. of Committee to Cooperate with the Judicial Council*, 69 N. Y. ST. BAR ASS'N REP. 342, 351-367 (1946), which reflects an unusual satisfaction with the much debated and debatable New York practice; but see the able *Memorandum on Proposal to Empower the Court of Appeals to Make Rules of Procedure for the Courts of the State of New York*, 2 THE RECORD 12-26 (1947), which is signed on behalf of four committees—for the American Bar Association, the Citizens Committee on the Courts, and the influential city and county bar associations.

[40] This philosophy has been stated in my SIMPLIFIED PLEADING (A. B. A. Jud. Adm. Monographs, Ser. A, No. 18), HANDBOOK NAT. CONF. JUD. COUNCILS 136 (1942), 2 F. R. D. 456, 27 IOWA L. REV. 272 (1942), and *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A. B. A. J. 976 (1937), CODE PLEADING 56-58 and c. 4 (2d ed. 1947), and *cf.* Hunter, *One Year of Our Federal Rules*, 5 MO. L. REV. 1 (1940); Dioguardi v. Durning, 139 F. 2d 774 (C. C. A. 2d 1944).

state, to indicate "the simplicity and brevity of statement which the rules contemplate."[41] With the illustrations provided by the forms it was not possible for a court to conclude that the old detailed allegations of some of the code systems could be a requirement under the new practice. Possibly the most interesting example is the form of a complaint for negligence against an autoist which comes directly from a Massachusetts statutory form based, in turn, upon the simple allegations of the old action on the case. Notwithstanding its historical background some attack was made upon it as being unrecognized in American law. But under the new rules, as under the old practice, it has proved quite adequate and effective.[42]

A necessary corollary to this system was, of course, the union of law and equity. If two separate systems, at war with each other, were to be retained in the federal courts, it was obvious that directness of procedure would be impossible. But so easy was the acceptance of this principle of union, so little problem has it actually presented under the rules, that the many doubts expressed before their enactment, even questions of constitutionality, seem now merely relics of antiquity. Perhaps nowhere has a complete acceptance of the rules been more completely demonstrated than in the entirely unruffled application of this fundamental principle, which at an earlier time would have been necessarily the most novel and debated feature of the new reform.[43]

The all-inclusive civil action has also been demonstrated as an obvious and desirable feature of modern reform. But it is carried further under the new rules in general than even in the more advanced state codes. With the de-emphasizing of particularized pleading there remained no reason why all claims between litigants could not be desirably adjusted at one time. If necessary or convenient, separate stages of trial could be ordered; but such matters could properly be left to the discretion of the trial judge. Of course the exigencies of federal jurisdiction may pre-

[41] Rule 84, FED. R. CIV. P.; *cf.* Appendix of Forms 1-27; Committee's Note to amendment to Rule 84, REPORT OF PROPOSED AMENDMENTS 118, 119 (June, 1946); CLARK, CODE PLEADING 239-245 (2d ed. 1947).

[42] Fed. Form 9 from MASS. GEN. LAWS, c. 231, §147 (1932); Williams v. Holland, 10 Bing. 112, 131 Eng. Rep. 848 (C. P. 1833); 2 CHITTY, PLEADING 529 (7th ed. 1844). For supporting authorities see CLARK, CODE PLEADING 243, 244, 300, 301 (2d ed. 1947).

[43] See, *e.g.*, Hurwitz v. Hurwitz, 136 F. 2d 796 (App. D. C. 1943); Groome v. Steward, 142 F. 2d 756 (App. D. C. 1944); Beaunit Mills v. Eday Fabric Sales Corp., 124 F. 2d 563 (C. C. A. 2d 1942); *One Form of Action*, 32 A. B. A. J. 408 (1946); Pike and Fischer, *Pleadings and Jury Rights in the New Federal Procedure*, 88 U. OF PA. L. REV. 645 (1940); Holtzoff, *Equitable and Legal Rights and Remedies under the New Federal Procedure*, 31 CALIF. L. REV. 127 (1943); Morris, *Jury Trial Under the Federal Fusion of Law and Equity* 20 TEX. L. REV. 427 (1942); but see McCaskill, *Jury Demands in the New Federal Procedure*, 88 U. OF PA. L. REV. 35 (1940), and note 36, *supra*. Earlier there had even been claims of unconstitutionality, effectively answered by Dean Pound, *Law and Equity in the Federal Courts*, 36 A. B. A. REP. 470, 73 CENT. L. J. 204 (1911); Chief Justice Taft, *supra* note 12; and others cited in CLARK, CODE PLEADING 32, 102 (2d ed. 1947). The nostalgic dictum for the old separation (inconsistent with the court's decision) expressed in Bereslavsky v. Caffey, 161 F. 2d 499 (C. C. A. 2d 1947), is unusual in the federal decisions; but the persistence of support for inconsistent and warring procedures in states such as New Jersey, once again in the throes of constitutional reform, does seem remarkable. *Cf.* examples cited in Clark, *Divided Law and Equity Jurisdiction*, 28 J. AM. JUD. SOC'Y 29 (1944), and 67 N. J. L. J. 85 (1944). See, in general, CLARK, CODE PLEADING 22, 28, 32, 40, 78-127 (2d ed. 1947); also note 62, *infra*.

vent in practice as complete an application of this principle as is possible in the state courts. Nevertheless the principle has shown its effectiveness in federal operation. There all claims or counterclaims or cross claims between the parties may be joined in the one action without reference to the "nature of the cause of action" or other ancient forms of restriction. As concerns multiple parties, there may be extensive joinder of many plaintiffs or many defendants, subject only to the general requirement that there be a common question of either law or fact affecting them. And the system is rounded out by extensive provisions for amendment, adding of claims, and adding, dropping, or intervention of parties.[44]

This, then, is the fundamental background and basic principle of the new system. There have been newer and special devices—discussed below—which have perhaps attracted more attention and more immediate popular interest. But the fact that this system should have gone into operation so quietly and unobtrusively shows how well it was adjusted to both modern needs and modern ideas. The only matters requiring even a period of adjustment before they operated smoothly appear to have been those involving the abolition of the demurrer in favor of the omnibus motion or answer raising all objections at one time and the restrictions set upon the grant of a motion for a bill of particulars. Here, also, the practice has become uniform and effective, even without the aid of the amendments recently adopted which emphasize the original purpose and still further discourage dilatory procedural strategy.[45] Moreover, however interesting may be the newer procedural devices such as discovery and pre-trial conferences, they would have been limited in scope and effectiveness but for this thorough acceptance of the fundamental objectives of the system. And, as we shall see, not all of these are completely adopted by the courts or have yet achieved their fullest potentialities. Hence we may count it a boon that while they occupy the limelight the main system itself is working its way quietly and unobtrusively into the settled experience and habits of the profession.

Among the newer procedural devices, those designed to develop the issues on the merits quickly, and if possible in advance of trial, have achieved the greatest interest. These are the provisions for discovery, for pre-trial conferences, and for summary judgment. The discovery provisions call for the taking of depositions or the answers

[44] These provisions appear in FED. R. CIV. P., 2, 13-15, 18-25 42, 54, and are discussed in CLARK, CODE PLEADING 58, 65, 144-146 and cc. 6, 7, 10, 12 (2d ed. 1947). Pleas for yet more extensive joinder appear in *Recent Trends in Joinder of Parties, Causes, and Counterclaims*, 37 COL. L. REV. 462 (1937), Blume, *Scope of a Civil Action*, 42 MICH. L. REV. 257 (1943), Blume, *Free Joinder of Parties, Claims, and Counterclaims* (A. B. A. Jud. Adm. Monographs, Ser. A, No. 11), HANDBOOK NAT. CONF. JUD. COUNCILS 77, 2 F. R. D. 250 (1942), and elsewhere; indeed, some modification of ancient joinder restrictions seems one of the first steps of state reform discussed *infra*. But still more notable is "the immense travail that our own procedure has undergone to reach, in its more progressive forms, a result not very far distant from that which the gentler evolution of procedural institutions, since the reception of the Roman law, has given to the more advanced codes of the Continental countries." Millar, *The Joinder of Actions in Continental Civil Procedure*, 28 ILL. L. REV. 26, 177 (1933).

[45] See Advisory Committee's notes to proposed amendments to Rules 12(b) and 12(e), REPORT OF PROPOSED AMENDMENTS 11-17 (June, 1946); and discussion in CLARK, CODE PLEADING 341-344, 540-545, 549, 555, 556 (2d ed. 1947), and citations *supra* note 40.

to interrogatories or the delivering up of documents, photographs, and the like in all civil actions. Thus simply on notice in a pending suit discovery may be had not merely of potential evidence to be used at trial, but also of testimony reasonably calculated to *lead to* the discovery of admissible evidence. The objection to the so-called "fishing expedition" is repudiated, and the principle that more is to be gained by knowledge on the part of all litigants of all features of a case than by a surprise attack is now established.[46]

Such a system seems thoroughly desirable as an assisting means to effective disclosure of the truth in any lawsuit. But it does present a problem, not yet thoroughly explored, in the possibility of increased costs, particularly to the poorer litigants, since the taking of a deposition may often involve expenses of travel and of the employment of additional counsel. There have been plans for research in this important field, but as yet we lack sufficient information to determine whether or not the procedure is open to abuse in this regard.[47] On the other hand, some more spectacular problems have received unusual attention. Chief among these has been the question of discovery of "lawyers' files," *i.e.*, of materials obtained by the lawyers in preparation of a case. But the Supreme Court seems to have settled the issue in a recent case in which it rejected the extreme claim of complete privilege and, while restricting discovery of such material in the ordinary case, recognized its use in situations where it is necessary to the full development of the facts in a particular case.[48]

The federal rule authorizing district judges to conduct pre-trial conferences with the attorneys in pending cases for the purpose of settling and simplifying the issues has been widely approved and adopted in state procedure. Enthusiasts have criticized the optional character of the rule. But calendar conditions, the necessity of circuit travel, and like local conditions may make it difficult for a judge to meet such assignments. Further, in spite of the undoubted worth of the rule, its operation has not been equally effective with all judges. Some have stressed the bringing about of settlements of cases, a result which can be safely treated only as a by-product of clarification of the issues, not as an end in itself. Many have failed to enter an adequate pre-trial order, definitely settling and recording the matters discussed at the conference; without this the matters are left at large at the trial, and the device has largely failed of its usefulness. This, then, must be considered a worth-while

[46] Hickman v. Taylor, 329 U. S. 495, 507 (1947); Pike and Willis, *Federal Discovery in Operation*, 7 U. OF CHI. L. REV. 297, 303 (1940); Advisory Committee's notes to proposed amendments to Rules 26(b) and 30(b), REPORT OF PROPOSED AMENDMENTS 34-36, 40-47 (June, 1946). The amendment to Rule 26(b) re-enforces the principles originally stated.

[47] A promising investigation of cases in the Southern District of New York, conducted by the New York Law Society, was halted by the war before the stage of publication was reached.

[48] Hickman v. Taylor, 329 U. S. 495, 513 (1947), which refers to "the widespread controversy among the members of the legal profession" over the problem; this is also brought out in the Advisory Committee's notes, cited in note 46, *supra*. While the Court had failed to approve the Committee's proposed amendment to Rule 30(b), committing the matter to the discretion of the trial judge to prevent hardship or injustice, the result of this case is in substantial accord with the proposal and appears to make amendment unnecessary.

reform, which must be allowed time to grow into the habits of judges and lawyers before its fullest utility is achieved.[49]

The summary judgment is of more ancient lineage. It was quite fully developed in England and in some of the states, particularly New York, where it appeared as a civil practice rule in 1921. But the federal procedure does not follow the earlier practice of restricting the remedy to debt and contract claims. It allows such a judgment in any civil action upon a motion supported by affidavits, pleadings, or depositions which show that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Some appellate judges in their anxiety lest a plaintiff be deprived of full opportunity of attempting to prove his case have expressed objection to "trial by affidavits," overlooking the simple justice of affording a defendant protection against the expense and at times cruelty of a long trial on perfectly footless claims. In earlier times some such claims were disposed of on issues of law by the practice of sustaining demurrers. But this placed the emphasis upon pleading niceties, and was at times unduly harsh, but more often merely inconclusive and dilatory. The summary-judgment practice successfully centers attention directly on the merits, and the safeguards placed about it prevent its improper use to shut off trials unfairly or unduly. The appellate courts must of course check any undue assiduity on the part of district judges in applying the rule; but I am bound to say that in my experience, contrary to that asserted by some of my colleagues, the reversals on the whole seem to me to suggest more cases of doubtful, if not downright harsh, results than do the affirmances. But in consequence enough doubt has been developed about the practice—beyond the motions involving relatively clear questions of law alone—to deprive it of its fullest utility as yet.[50]

[49] There is now considerable literature centering about Rule 16, FED. R. CIV. P.: *Pre-Trial Procedure, Rep. of Pre-Trial Committee of the Jud. Conf. of Senior Circuit Judges,* 4 F. R. D. 83-103 (1946); *Pre-Trial Clinic,* 4 F. R. D. 35-82 (1946); Shafroth, *Pre-Trial Techniques of Federal Judges,* 28 J. AM. JUD. SOC'Y 39 (1944); Laws, *Pretrial Procedure under the New Federal Rules,* 12 Mo. B. J. 95 (1941); Klitzke v. Herm, 242 Wis. 456, 8 N. W. 2d 400 (1943); and other references given in CLARK, CODE PLEADING 572-574 (2d ed. 1947).

[50] Rule 56, FED. R. CIV. P., has been extensively employed, as shown by citations in CLARK, CODE PLEADING 556, 566, 567 (2d ed. 1947). See generally, BERNARD LLOYD SHIENTAG, SUMMARY JUDGMENT (1941), a revision of 4 FORD. L. REV. 186 (1935); and Clark, *Summary Judgments* (A. B. A. Jud. Adm. Monographs, Ser. A. No. 5), HANDBOOK NAT. CONF. JUD. COUNCILS 55, 2 F. R. D. 364 (1942), 25 J. AM. JUD. SOC'Y 20 (1941). For some differences of view see Arnstein v. Porter, 154 F. 2d 464 (C. C. A. 2d 1946), Clark, J., dissenting; the order of reversal led to a long and expensive trial, with verdict and judgment for defendant, aff'd on appeal, Arnstein v. Porter, 158 F. 2d 795 (C. C. A. 2d 1946), *cert. denied,* 330 U. S. 851 (1947), where, it is believed, a plaintiff's verdict could not have withstood review. For criticism see 55 YALE L. J. 810 (1946); 45 COL. L. REV. 964 (1945); WERNER ILSEN, FEDERAL RULES OF CIVIL PROCEDURE, WITH APPROVED AMENDMENTS 346 (rev. ed. 1947) ("may well become nothing more than a glorified motion for judgment on the pleadings"); Kennedy, *The Federal Summary Judgment Rule—Some Recent Developments,* 13 BROOKLYN L. REV. 5 (1947); and for differing results by the same judges, see Dixon v. American Tel. & Tel. Co., 159 F. 2d 863 (C. C. A. 2d 1947); Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F. 2d 246 (C. C. A. 2d 1947), *cert. denied,* 68 Sup. Ct. 88 (U. S. 1947); Ricker v. General Electric Co., 162 F. 2d 141 (C. C. A. 2d 1947); and see also Griffin v. Griffin 327 U. S. 220, 235, 236 (1946), and the discussion at the Tenth Circuit Conference as reported in 33 A. B. A. J. 1111, 1112 (1947).

Other new procedural devices, concerned particularly with the addition of parties, are perhaps even better known. The use of broad forms of claims in the nature of interpleader, of class actions, of intervention, of the declaratory judgment, has become reasonably well settled.[51] Perhaps one of the most interesting is the impleader of third parties, the bringing in by a defendant of a party answerable over to him. An attempt was made in the new rules to expand this practice to allow the impleader of a party answerable only to the plaintiff, thus allowing the defendant to force upon the plaintiff an unexpected opponent. In practice this has not proved workable, particularly in the light of the limitations of federal jurisdiction; and the new amendment calls for elimination of this feature of the rules. There is no reason, however, why in state courts of unlimited jurisdiction there should not be further experimentation with this broad form of impleader.[52]

V

THE FEDERAL RULE-MAKING PROCESS AS MODEL

Beyond the desirable qualities of the rules themselves, other factors, while making originally for diversity, tended in the long run to make for ready acceptance of federal uniformity. Once authorization of the reform was achieved in Congress, the wide expanse of the federal system and the centralizing influence and prestige of the Supreme Court operated to make the task somewhat easier than it appears to be in the states. It was less likely that opposition would develop in any extensive way among the widely scattered federal practitioners than among, say, the local bar of a state, which can be organized in opposition to a local reform. Both the wide diffusion of the potential opposition and the burden of opposing formal action by the highest court of the land, particularly when that action was based upon the report of a committee acting deliberately with the advice of organized groups and individual members of the profession, presented substantial hurdles. Moreover, the early and long-continued support of the American Bar Association, coupled with the enthusiasm of local bar associations consulted in the drafting of the rules, made this fairly conclusive.[53] At any rate, opposition, as we have seen, has been practically negligible since the adoption of the rules.

Such conditions, particularly those involving the leadership of the Supreme Court, cannot be completely duplicated in the states. Indeed, in some cases, as pointed out below, perhaps notably Nebraska, developments have taken a contrary

[51] Rules 22-24, 57, FED. R. CIV. P., and citations in Advisory Committee's notes to these rules, and in CLARK, CODE PLEADING 333-338, 396-408, 420-423 (2d ed. 1947); *cf.* note 44, *supra*.

[52] See Advisory Committee's Note to amendment to Rule 14, FED. R. CIV. P., Report of Proposed Amendments 21-23 (June, 1946); 20 SO. CALIF. L. REV. 215 (1947); CLARK, CODE PLEADING 408-419 (2d ed. 1947).

[53] Clark, *A Striking Feature of the Proposed New Rules*, 22 A. B. A. J. 787 (1936); PRELIMINARY DRAFT OF RULES OF CIVIL PROCEDURE xviii, xix (May, 1936); REPORT OF THE ADVISORY COMMITTEE vi (April, 1937); *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A. B. A. J. 97, 98 (1938). The continued support of the American Bar Association for procedural reform is noted below. See notes 58, 63, *infra*.

course, leading to the overturning of a state reform once secured. We must concede, for good or ill, the possibilities of swifter mobilization for or against reform on the part of smaller and more integrated units of the profession. But that factor may operate either way. Thus no longer, as in the federal history, should it be necessary to require more than a quarter of a century for the fruition of reform. Moreover, the specific means employed in federal rule making can be usefully adapted to state action and, as experience shows, can form an effective basis for achieving results. First among these is the vesting of the rule-making authority in the highest local court and the drafting of rules under its supervision by as expert a committee as can be secured. This insures both a more thorough job than other sources would produce and also the prestige and backing of the judiciary.[54] Next, the opportunity given to local groups or individual lawyers to criticize and suggest improvement is also rather fundamental in avoiding errors in draftsmanship and in securing a broad basis of support.[55] Finally, the greater knowledge now available of the best procedure and the prestige acquired by present-day procedural reforms is a great advantage. It should be utilized to the full in the most effective way possible. In this task, it must be recognized finally that the chief need is one of leadership, as was developed in the federal reform, and that opposition of those used to the old practices must be expected. In matters of political and social policy even democracy needs to be sparked by leadership. Democracy as the sole source of technical procedural rules is not enough.[56]

We shall now turn to some of the pending movements and already achieved reforms in the states. These have surely been substantial and important. One cannot avoid the feeling, however, that as yet full use has not been made of the impetus of the federal reform. True, there has been a wholly admirable and unusual stirring of interest among lawyers, with some very definite results. But all too often this has resulted in what seem, in all frankness, to have been weak and uncourageous attacks on the old citadels by the leaders of reform. They have shown themselves too willing to accept the principle that "our own system is really very good, better than most, and needs only to be brought up to date here and there." Such an attitude is a compromise and a loss of the battle almost at the beginning.[57]

VI

THE FEDERAL REFORM IN THE STATES

Immediately on the adoption of the rules there was a strong impetus for their consideration in the various states. Since agitation for procedural reform has been

[54] The literature in favor of the rule-making authority in the courts is now so extensive that even the bibliographies cannot be included here. See CLARK, CODE PLEADING 60-62 (2d ed. 1947); Harris, *The Rule-Making Power* (A. B. A. Jud. Adm. Monographs, Ser. A, No. 1), 2 F. R. D. 67 (1943); FIFTH REP. N. Y. JUD. COUNCIL 271-312 (1939); TENTH REP. N. Y. JUD. COUNCIL 159-172 (1944); REV. REP. ON RULE MAKING POWER OF THE SUPREME COURT BY THE JUDICIAL COUNCIL OF THE STATE OF MINNESOTA (June 1, 1944); and *Memorandum*, *supra* note 39.

[55] See note 53, *supra*.

[56] See notes 1, 2, 39, *supra*.

[57] See note 38, *supra*, also notes 59, 60, 61, *infra*.

widespread in recent years and since, among other protagonists, the American Bar Association was supporting the movement through general and state committees,[58] it was but natural that the enthusiasm engendered by the new federal rules should produce results. Hence three states—Arizona, Colorado, and New Mexico—at once adopted the federal rules in full, with only very limited, and quite minor, changes needed for the adaptation. To date this is still the greatest achievement of the federal reform so far as the states are concerned. Almost as extensive a system was adopted under the favorable auspices of the state supreme court in Nebraska, only to achieve the unusual fate of opposition from the legal profession and complete repeal by the legislature. A like movement in Florida has been stopped, at least temporarily, notwithstanding the continuing activity of the state bar, by opposition within the highest court itself, expressed in favor of a hybrid system containing so many of the federal rules as to cast doubt upon the arguments urged against their full adoption. In Iowa, Missouri, and Texas the reform movements led to completely new codes or sets of rules. But here, unfortunately, local views prevailed, so that in each case the result is the same unfortunate hybrid system to which reference has just been made.[59]

More limited adaptations of parts of the federal system have occurred in Pennsylvania and in South Dakota, while comparatively smaller parts have been adopted in Maryland (dealing with discovery), New York (parties and their joinder), and other states. Many states have adopted provisions for pre-trial conferences modeled on the federal rules. Here, too, the results are varying. Thus the limited Pennsylvania reform seems not to have given satisfaction, and the rule-making committee has now been reconstituted with broader authority. Some of the South Dakota changes are symptomatic of some of the partial changes made twenty-five years ago in New York, which, by their conflicting inadequacies, caused unnecessary litigation there.[60] Of course it is possible for certain special federal rules to be adopted

[58] Particularly through its Special Committee on Improving the Administration of Justice under the leadership of Judge John J. Parker and the co-operating local state committees. The monographs sponsored by the Committee have been cited above; the bulletins give the latest reports from the field. See Bull. No. 10 (Aug. 1, 1947), cited notes 59, 60, 63, *infra*.

[59] For citations see CLARK, CODE PLEADING 50-54 (2d ed. 1947). For the Nebraska experience see the writer's article in 21 NEB. L. REV. 307 (1942), also 21 *id.* 76, 94 (1942); 26 J. AM. JUD. SOC'Y 170 (1943); Neb. Sess. Laws 1943, c. 63 (the repealing statute); 27 J. AM. JUD. SOC'Y 19 (1943). In Florida the court first held it lacked rule-making authority. *In re* Petition of Florida State Bar Ass'n, 145 Fla. 223, 199 So. 57 (1941). Then after the legislature had granted the authority, it refused adoption of the federal rules for an intermediate system, set forth by Mr. Justice Terrell, *id.* 155 Fla. 710, 21 So. 2d 605 (1945), 19 FLA. L. J. 119 (1945); and see also Justice Terrell's statements and articles in 20 FLA. L. J. 28, 281 (1946), and 21 FLA. L. J. 89 (1947). The bar appears to be still pressing for the full reform, 21 FLA. L. J. 60 (1947); 30 J. AM. JUD. SOC'Y 65 (1946), 29 *id.* 31 (1945); Bull. No. 10, cited note 58, *supra*. Articles critical of the limited reforms in Iowa, Missouri, and Texas, including the writer's article on the Texas rules in 20 TEX. L. REV. 4 (1941), are cited in CLARK, CODE PLEADING 51, n. 145 (2d ed. 1947).

[60] For the limited changes in Maryland, Pennsylvania, and South Dakota and the criticisms thereof, particularly the local criticisms in Pennsylvania, see CLARK, CODE PLEADING 51, n. 146 (2d ed. 1947), and compare articles cited note 38, *supra;* see also Bull. No. 10, cited note 58, *supra*, for more recent activity in the latter state. For the New York revision of 1947 as to parties, see ELEVENTH REP. OF N. Y. JUD. COUNCIL 341-410, (1945) TWELFTH REP. 163-232 (1946); and CLARK, CODE PLEADING, c. 6 (2d ed. 1947). For pre-trial in the states, see authorities cited note 49, *supra*, particularly 4 F. R. D. 83.

in default of further changes. Thus the pre-trial rule may be added to an already defined system. In general, however, I believe the principle sound that a hybrid reform is of doubtful value, perhaps even more doubtful than any change of system. Such a cross-sterilization causes all the uncertainty and confusion of the complete reform without the lasting benefits of the latter. Meanwhile it renders lasting change more difficult.[61]

There are other states where the federal reform has had less effect. Thus in Alabama reform was made extensively following the principles of English chancery, rather than the federal model. In New Jersey an attempt to unite law and equity, embodied in the new constitution, failed with the failure of that constitution. The activities of the new constitutional convention seem to be devoted to a somewhat more limited reform, achieving only separate law and equity "sides" of a single court, rather than the completely divided system of the past.[62] There are active reform movements or pressures from the bar associations in numerous other states, including Delaware and Rhode Island.[63] How long this ferment will last and how far it will go cannot now be prophesied. Even if the direct impetus from the federal achievement tends to lose momentum, the indirect consequences from the stimulus to wise thinking about procedural reforms which extended to the law schools and law reviews, and is now found in so many articles and books, together with the efforts of the American Bar Association and local associations to extend the system, should continue and perhaps even broaden indefinitely. And with the passage of time, the stimulus from the just adopted federal rules of criminal procedure will undoubtedly operate also to carry that reform to the states.

VII

TOWARD A PROCEDURAL JURISPRUDENCE

Many authorities have commented upon the absence from our legal system of anything approximating the procedural jurisprudence which is so striking a feature

[61] Thus Justice Terrell, *supra* note 59, in opposing local adoption of the federal rules, states as a conclusion from his correspondence with state chief justices that since the effective date of the rules, thirty states have considered reform of their procedure and twenty-eight have not followed the federal system. 21 FLA. L. J. 89 (1947). He does not include Colorado among states which have fully adopted that system. See also note 63, *infra*.

[62] Reports in the daily press indicate the strong opposition to even this measure of reform in New Jersey. For earlier attempts, and for the Alabama change, see note 43, *supra*; CLARK, CODE PLEADING 28-30 (2d ed. 1947); Sims, *New Alabama Equity Rules*, 1 ALA. LAWY. 13 (1940). Happily the new constitution for New Jersey, achieving a considerable measure of (if, perhaps, not complete) union, was adopted at the November, 1947, election; and the choice of Dean Arthur T. Vanderbilt as the new Chief Justice insures wise and vigorous exercise of the rule-making and administrative powers which now go with that office.

[63] All such movements are discussed in Bull. No. 10, cited note 58, *supra*, current numbers of the Journal of the American Judicature Society (*cf. States Move to Modernize Civil Procedure*, 24 J. AM. JUD. SOC'Y 189 (1941)), the articles cited in notes 33, 61, *supra*, and CLARK, CODE PLEADING 50-54 (2d ed. 1947). In the book review by Stayton of SCOTT AND SIMPSON, CASES AND MATERIALS ON JUDICIAL REMEDIES (2d ed. 1946), 25 TEX. L. REV. 558, at 564-566 (1947), there is an appendical note by the Research Librarian of the University of Texas Law School attempting to give citations of all state rule-making changes since the adoption of the federal rules. This is a helpful authority; but care in its use is necessary, because it includes all amendments of appellate court rules, whether or not they affect trial court procedure, and it excludes statutory reforms such as those of Iowa and Missouri.

of the continental and civil systems of law. Indeed, in the past there has been strong support for the idea that such a jurisprudence is both impossible and undesirable because of the need to emphasize local and particular systems. Distinguished lawyers and judges urged that law schools could not present general courses on these subjects and that only the study of particular codes was worth while. Such particularism in approach to procedure may be a partial explanation for the multitude of limited, conflicting, and undesirable procedural decisions in this country.[64]

Hence any statement of means and methods toward a new procedural system may well conclude with a plea for an American procedural jurisprudence or philosophy. Possibly, since so many American lawyers are conditioned against it, we should not use the word "jurisprudence." Certainly no Austinian, Hohfeldian, or other formal scheme of jurisprudence is intended. Rather we are looking more for an attitude or approach which should not be limited to one particular topic or subject in the field of adjective law, but which should permeate and shape it all. Some may say that this is to achieve the very emphasis upon the subject which it is the intent of modern procedure to avoid.[65] But what is contemplated is certainly not a new apotheosis of procedure. Rather it is the view that a lack of appreciation and understanding, even of willingness to bother with the modern philosophy of pleading, is the cause of many of the surprising procedural results.

It may well be urged that the abler the court, the more likely are strange procedural decisions to be forthcoming. This is a view contrary to the oft-repeated dogma that our judiciary is too politically chosen, too lacking in deep experience, to understand and operate a flexible, discretionary system of procedure. But in truth, if these criticisms are at all true of the American judiciary, they afford the strongest reasons for such a system. If examples were not invidious, one could point to the marked success with such systems by many judges who do not aspire to be named as world-renowned legal philosophers and who might confess to political pasts.[66] On the other hand, many of the great judges tend to look down upon pleading as unworthy of great thoughts, and hence stumble over some of the more trite problems which a deeper appreciation would have enabled them to avoid. Moreover, and most doubtfully, they resort to pleading rules often literally manufactured

[64] See discussion, with citations, in CLARK, CODE PLEADING 69-71 (2d ed. 1947). For a broader approach see Vanderbilt, *Judicial Administration in the Law School Curriculum*, 27 J. AM. JUD. SOC'Y 179 (1944); McDonald, *The Procedure Curriculum in a Period of Reform*, 9 AM. L. SCHOOL REV. 1053 (1941); MAYNARD E. PIRSIG, CASES AND MATERIALS ON JUDICIAL ADMINISTRATION (1946).

[65] Thus Professor Stayton says in the book review cited note 63, *supra*, 25 TEX. L. REV. 558, 563 (1947): "Then, too, procedure is tending to become unimportant and procedural statutes are more and more taking the form of rules." He then goes on to speak appreciatively of "the principle of adaptation to justice." But however desirable, the principle is not so simple as that of justice according to the length of the chancellor's foot.

[66] Would it be out of place to suggest that those judges who have come to the federal bench from the halls of Congress or other governmental office are among the finest expositors of the federal rules? Conversely one may ask how the outwardly precise, but actually vague, abstractions of a Field Code may help a new and innocent judge to know the facts of judicial life.

for the occasion, although given a semblance of antique aura without basis in fact. As such decisions ripple down from the higher appellate courts to the lower trial courts they render procedure increasingly doubtful, confusing, and arbitrary.[67] It hardly befits the dignity of courts thus to conceal from litigants the real bases of their decisions. Perhaps momentarily it may seem easier or shorter for a court to rely on ancient assumed verities of procedure than upon a rehearsal of the equities in support of its actual decision. But in the long run this seems a stultifying process. Would it not be better, notwithstanding the possibility of criticisms of partiality by some defeated litigants, if the real basis of the decision were to be asserted and the procedural rules kept in their more appropriate subordinate position?

Therefore the greatest consequence of the new federal procedural system and its success in operation may well be a new orientation toward the whole subject of adjective law and the development of something more closely approaching a philosophy as to its place in the American legal scheme than it has had in the past. In short, the true impetus of the federal reform is toward a greater understanding of the subject. With understanding comes the power to use it appropriately and within its proper realm.

[67] See CLARK, CODE PLEADING 71 (2d ed. 1947). Thus teaching of the subject is forced into the situation of collecting "horrible examples" of "waste motion in the legal process." Brandis, 11 FORD. L. REV. 122 (1942), reviewing and referring to CLARK, CASES ON PLEADING AND PROCEDURE (2d ed. 1940).

Supplemental note: Since this article was prepared I have learned that effective January 1, 1948, Delaware has adopted the federal rules in its Superior Court (its trial court for law actions), including the amendments not effective in federal practice until March 19, 1948, and retaining the federal numbering notwithstanding the omission here and there of a federal provision.

THE LAW APPLIED IN THE FEDERAL COURTS

FRANK W. SNEPP*

I

When the First Congress met, the national struggle between the Federalists and the anti-Federalists was reflected in the debates over the jurisdiction to be conferred upon the federal courts.[1] One group of anti-Federalists wanted no system of lower federal courts at all, and would have left the enforcement of federal laws to the tribunals of the states. Others favored the establishment of federal district courts, but with jurisdiction limited to admiralty and maritime causes. The Federalists, on the other hand, favored the establishment of a system of federal courts clothed with all the powers granted by the Constitution.

It was finally determined that there was to be a system of district courts, but their jurisdiction was hotly argued. Specifically, were these courts to be clothed with the power to hear and determine controversies "between citizens of different states"?[2] The followers of Hamilton argued, against bitter opposition, that it was desirable to afford for out-of-state litigants tribunals which would be free of the local prejudices likely to be encountered in state courts—an important consideration in the young nation of thirteen provincial and mutually suspicious states. There was also the hope that by staying out of state courts the commercial and trading classes could avoid some of the growing antagonism of the debtor class.[3]

The Federalists carried the day, and jurisdiction in diversity cases was conferred upon the federal district courts.[4]

What law was to be applied by the federal courts? The Congress enacted, in Section 34 of the Judiciary Act of 1789, that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."[5]

Perhaps no other single word in American law has evoked as much controversy among lawyers and legal scholars as has the word "laws" in this act. Did the drafters intend that it include state decisional law as well as state statutory law? Professor Warren, as a result of his study of the original papers of the First Congress, concluded that they did so intend.[6] Other scholars have argued that they did not.[7]

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[1] See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

[2] U. S. CONST. Art. III, §2.

[3] Warren, *supra*, note 1, at 82, 83.

[4] 1 STAT. 73 (1856), REV. STAT. §530 *et seq.* (1875).

[5] REV. STAT. §721 (1875), 28 U. S. C. §725 (1940).

[6] Warren, *supra* note 1, 81-88.

[7] Teton, *The Story of Swift v. Tyson*, 35 ILL. L. REV. 519 (1941).

Whatever may have been in the minds of the committee that wrote it, the word was sent forth into the world ambiguous and undefined.

There are strong indications that the early federal judges believed that "laws" included the decisions of state courts, but the picture is not entirely clear. It was early held that state rules affecting property rights and decisions interpreting statutes would be followed.[8] The Supreme Court in 1834 said that "there can be no common law of the United States."[9] State law was in at least one case expressly followed on a non-property question, but Justice Chase noted that he concurred only because the general common law was the same.[10]

In 1842 the famous case of *Swift v. Tyson*[11] settled the question—though not the argument—for the next ninety-six years. Justice Story, who wrote the opinion, held that the New York law of negotiable instruments need not be followed by a federal court, because that law was not founded upon statute or local usage, but was deduced from the general common law. The word "laws" in Section 34 did not include state decisions. "They are, at most," he wrote, "only evidence of what the laws are, and are not of themselves laws."[12] In the fields of contracts and commercial instruments the federal courts were free to discover the law "in the general principles and doctrines of commercial jurisprudence."[13] Thus was born a doctrine which during its long career was to evoke a host of learned articles, impassioned dissents, and as impassioned judicial apologiae.[14]

The doctrine of general law was extended far beyond contracts and commercial paper.[15] It became settled that the only cases in which a federal court was bound to follow state decisions were those in which a state statute, a settled local rule of property, or a "local custom" was involved.[16]

Even in these three categories there were broad exceptions. In 1863, in *Gelpcke v. Dubuque,*[17] the Supreme Court held that, where rights had accrued under a state decision sustaining the validity of a state statute, federal courts were free to ignore a subsequent state decision overruling the first. This doctrine, in its implications inconsistent with the judicial philosophy which underlay *Swift v. Tyson,*[18] in prac-

[8] McKeen v. DeLancy's Lessee, 5 Cranch 22 (U. S. 1809); Green v. Lessee of Neal, 6 Pet. 291 (U. S. 1832); Livingston's Lessee v. Moore, 7 Pet. 469 (U. S. 1833).

[9] Wheaton v. Peters, 8 Pet. 591, 658 (U. S. 1834).

[10] Brown v. Van Braam, 3 Dall. 344 (U. S. 1797); but see Teton, *supra* note 7, at 527-530.

[11] 16 Pet. 1 (U. S. 1842).

[12] *Id.* at 18.

[13] *Id.* at 19.

[14] Among the innumerable articles, see in addition to those already cited: Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts,* 4 ILL. L. REV. 533 (1910); Green, *The Law as Precedent, Prophecy, and Principle; State Decisions in Federal Courts,* 19 ILL. L. REV. 217 (1924); Dobie, *Seven Implications of Swift v. Tyson,* 16 VA. L. REV. 225 (1930); Johnson, *State Law and the Federal Courts,* 17 KY. L. J. 355 (1929); Shelton, *Concurrent Jurisdiction—Its Necessity and Its Dangers,* 15 VA. L. REV. 137 (1938); Waterman, *The Nationalism of Swift v. Tyson,* 11 N. C. L. REV. 125 (1933); Jackson, *The Rise and Fall of Swift v. Tyson,* 24 A. B. A. J. 609 (1938).

[15] See the extensive annotation of general law subjects following 28 U. S. C. A. §725 (1940).

[16] Bucher v. Cheshire R. R., 125 U. S. 555 (1887); City of Chicago v. Robbins, 2 Black 418 (U. S. 1873).

[17] 1 Wall. 175 (U. S. 1863).

[18] *See* Rand, *Swift v. Tyson v. Gelpcke v. Dubuque,* 8 HARV. L. REV. 328 (1895).

tice became intermingled with the theory of "general law."[19] State law might also be disregarded where a state court had construed a statute after judgment in the federal court but pending appeal,[20] or when the state court spoke only after the rights of the parties had accrued but before the action was begun,[21] or if there had been but one state decision on the point.[22]

In diversity cases, the inevitable result of the doctrine of *Swift v. Tyson* and its progeny was widespread "forum shopping," especially by corporations. Merely because of diversity of citizenship a party could, by suing in federal court, or by removal of an action against him, obtain a result different from that ordained by the law of the state in which the cause of action arose.[23] In non-diversity cases also, state-created rights had one set of consequences in state courts, another in federal courts.[24]

There was powerful judicial dissent from the doctrine. Justice Field expressed the fervent hope that it, "like other errors, will, in the end 'die among its worshipers.' "[25] Justice Holmes vigorously attacked its extension and particular applications, denying that "there is one august corpus, to understand which clearly is the only task of any Court concerned."[26]

The merits of the doctrine were hotly debated by legal writers. It was attacked as allowing federal courts to control a field over which Congress had no power to legislate,[27] as failing to promote the promised uniformity,[28] and as historically inaccurate.[29] It was defended as promoting uniformity and as giving lawyers a nation-wide basis of prediction,[30] as the rightful exercise of an equal and independent judicial power,[31] and as the means for the enforcement of rights which had an existence independent of those enforced by state courts.[32]

By 1930 there seemed to be some tendency away from *Swift v. Tyson*. The

[19] *See* Township of Pine Grove v. Talcott, 19 Wall. 666 (U. S. 1873).

[20] Burgess v. Seligman, 107 U. S. 20 (1882).

[21] Kuhn v. Fairmont Coal Co., 215 U. S. 349 (1909); Great Southern Fireproof Hotel Co. v. Jones, 193 U. S. 532 (1904).

[22] Barber v. Pittsburgh, F. W., & C. Ry., 166 U. S. 83 (1897).

[23] Perhaps the most notorious example is Black and White Taxicab and Transfer Co. v. Black and Yellow Taxicab and Transfer Co., 276 U. S. 518 (1927). A corporation was organized in Tennessee, and purchased the assets of a Kentucky corporation, solely for the purpose of suing another Kentucky corporation in the federal courts and so avoiding a settled rule of Kentucky law.

[24] *See* Sec. II, *infra*.

[25] Baltimore & Ohio R.R. v. Baugh, 149 U. S. 368, 403 (1892).

[26] Black and White Taxicab v. Brown and Yellow Taxicab, *supra*, note 23, at 533; Kuhn v. Fairmont Coal Co., *supra*, note 21.

[27] Dobie, *Seven Implications of Swift v. Tyson*, 16 VA. L. REV. 225 (1930).

[28] Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499 (1928).

[29] Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

[30] Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A. B. A. J. 433 (1932).

[31] Schofield, *Swift v. Tyson: Uniformity of Judge-Made State Law in State and Federal Courts*, 4 ILL. L. REV. 217 (1924).

[32] Green, *The Law as Precedent, Prophecy, and Principle; State Decisions in Federal Courts*, 19 ILL. L. REV. 217 (1924).

Supreme Court began to show a disposition to restrict its operation, and to give more deference to the views of state courts.[33]

On April 25, 1938, the Court, in a rare departure from accepted appellate practice, struck down *Swift v. Tyson*. Justice Brandeis startled the legal world with the opening sentence of his opinion in *Erie Railroad v. Tompkins*:[34]

> The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.[35]

Neither party had raised such a question, either before the Supreme Court or below.[36]

Justice Brandeis reviewed the entire history of the doctrine of *Swift v. Tyson*, and, after the funeral oration, lowered the corpse into the grave:

> There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[37]

Justice Reed would not go so far as to agree that in applying *Swift v. Tyson* the federal courts had been guilty of almost a century of unconstitutional conduct.[38] The constitutional holding was not necessary to the decision; it was perhaps advanced to overcome the objection that Congress had by long acquiescence adopted Story's interpretation of Section 34.

Thus did the era of "general law" come to an end. One method of meeting the fundamental problem posed by the existence in our federal system of two systems of courts with concurrent jurisdiction had been tried and rejected. The basis of the new approach was laid down, but it still remained for the courts to define its full implications and extent.

II

Although it was in suits between citizens of different states that the doctrines of both *Swift v. Tyson* and *Erie Railroad v. Tompkins* have received their greatest emphasis, neither of these decisions was by its terms limited solely to diversity cases. Prior to 1938, federal courts held themselves free to make an independent determination of the law applicable to state-created rights whenever the question was one of "general law," regardless of the manner in which jurisdiction was acquired.[39]

[33] Mutual Life Insurance Co. v. Johnson, 293 U. S. 328 (1934); Note, *Some Recent Implications of Swift v. Tyson*, 48 HARV. L. REV. 979 (1935).

[34] 304 U. S. 64 (1938).

[35] *Id.* at 69.

[36] *Id.*, arguments of counsel, and dissenting opinion of Mr. Justice Butler, at 78.

[37] *Id.* at 78.

[38] *Id.* at 90. *See* Shulman, *The Demise of Swift v. Tyson*, 47 YALE L. J. 1336 (1938); Broh-Kahn, *Amendment by Decision—More on the Erie Case*, 30 KY. L. J. 3 (1941); Herriott, *Has Congress the Power to Modify the Effect of Erie Railroad v. Tompkins?*, 26 MARQ. L. REV. 1 (1941); Bowman, *The Unconstitutionality of the Rule of Swift v. Tyson*, 18 B. U. L. REV. 659 (1938).

[39] Willing v. Binenstock, 312 U. S. 272 (1937) (suit against receiver of national bank—question of set-off one of general law but state rule followed because same as federal rule and question balanced with doubt); *In re* Leterman, Becker, & Co., 260 Fed. 543 (C. C. A. 2d 1919) (question of priority of assignments in bankruptcy case one of general law); Bryant v. Williams, 16 F. 2d 159 (E. D. N. C. 1926) (jurisdiction under National Banking Act, question of ownership of notes held one of general law).

Since the *Erie* case, state decisional law must be followed by federal courts whenever a state-created right is involved, whatever may be the basis of jurisdiction.[40] This was made apparent by the Supreme Court in 1939, in *Wichita Royalty Co. v. City National Bank*.[41] The district court had jurisdiction by reason of the fact that the case was concerned with winding up the affairs of a national bank.[42] The Court held, on the authority of *Erie Railroad v. Tompkins*, that a state decision on the right to fasten a special trust upon a fund in the hands of a receiver must be followed by the federal court. Before the *Erie* case, this question had been held to be one of "general law."[43]

In the final analysis, of course, the federal courts still determine when state decisional law will be followed, since the characterization of a right as "state-created" or "federally created" is itself a federal question.[44] But once it has been determined that the right is one created by a state, and not by the federal government, a federal court must follow state decisional law, regardless of how it acquired jurisdiction.

III

Mr. Tompkins was walking beside the Erie Railroad tracks in the state of Pennsylvania when an object protruding from the doorway of a boxcar knocked him into judicial immortality. He brought suit in a federal district court in New York. While Mr. Justice Brandeis apparently assumed that the law of Pennsylvania rather than that of New York was controlling, he did not elucidate the steps in the process by which that conclusion was reached.

Under *Swift v. Tyson*, of course, such typical conflict-of-laws problems were obviated to the extent that "general law" was applied. Since "general law" would be followed no choice was necessary in many cases. When a determination was necessary, it was the general view that the choice of the proper law was itself a matter for independent determination by the federal courts, although there had been no direct holding on this point by the Supreme Court.[45]

In 1941, settling a conflict among circuits, the Supreme Court held in the *Klaxon*[46] case that under *Erie Railroad v. Tompkins* a district court must follow the choice-of-law rules of the state in which it sits.[47] Justice Reed in his opinion said:

> Any other ruling would do violence to the principle of uniformity within a state upon

[40] The occasional statement that the rule of *Erie Railroad v. Tompkins* applies only to cases of diversity is not accurate. The error arises from confusing those cases in which the right is a federal one with those in which the right is a state one. *See* Shackelford v. Latchum, 52 F. Supp. 205 (1943), where the court assigned this reason for not following state rule as to parol evidence in suit to recover federal income taxes.

[41] 306 U. S. 103 (1939).

[42] 36 STAT. 1092 (1911) 28 U. S. C. §41(16) (1940).

[43] Beard v. Independent Dist. of Pella City, 88 Fed. 375 (C. C. A. 8th 1898).

[44] Irving Trust Co. v. Day, 314 U. S. 556 (1942); Schuylkill Trust Co. v. Pennsylvania, 296 U. S. 102 (1935).

[45] Dygert v. Vermont Loan and Trust Co., 94 Fed. 913 (C. C. A. 9th 1899), did so hold. *See* annotation, 40 L. R. A. (N. S.) 426 (1926).

[46] Klaxon Co. v. Stentor Mfg. Co., 313 U. S. 487 (1941).

[47] Compare Sampson v. Channell, 110 F. 2d 754 (C. C. A. 1st 1940), with Klaxon Co. v. Stentor Mfg. Co., 115 F. 2d 268 (C. C. A. 3rd 1940); Wolkin, *Conflict of Laws in the Federal Courts; The Erie Era*, 94 U. of PA. L. REV. 293 (1946).

which the *Tompkins* decision is based. Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors.[48]

On the same day the Court further emphasized the application of the *Erie* doctrine to conflicts cases in *Griffin v. McCoach,*[49] in which it held that the district court is bound by the public policy of the state in which it sits.

One important question in the field of conflicts which is suggested by the *Erie* case has as yet had no answer from the courts. Does the doctrine of the *Klaxon* case govern conflicts cases where one of the contacts is with a foreign nation? New York,[50] for example, has held that it will not follow *Hilton v. Guyot*[51] on the recognition of foreign judgments. Does the *Erie* doctrine require a federal court sitting in New York to follow the state rule? Or is this, because of its close relation to foreign policy, a "federal field," in which state courts not only cannot bind the federal courts, but are themselves bound to follow federal decisional law?[52]

IV

While the substantive law applied by federal courts to state-created rights prior to 1938 was governed by *Swift v. Tyson,* "procedure" in federal courts was prescribed by the Conformity Act,[53] which provided that practice and procedure in the federal district courts should conform, "as near as may be," to that of the courts of the state in which the federal tribunal sat.

On June 19, 1934, Congress gave the Supreme Court power to prescribe general rules of procedure for the district courts in civil actions.[54] A distinguished committee of legal scholars and practitioners was appointed by the Court to draft the new rules, which were adopted by the Court on December 30, 1937.[55]

The Supreme Court was forbidden by Congress to affect any "substantive" rights by adoption of the Rules of Civil Procedure.[56] The inclusion of certain matters in the Rules apparently indicated that in the opinion of the Supreme Court they were "procedural." Four months later the *Erie* case declared that in certain types of cases the federal courts must determine the "substantive" rights of the parties according to state law. This posed the question, What is to happen if a rule of state law is so closely bound up with the question of recovery or non-recovery that

[48] 313 U. S. at 496 (1941).

[49] *Id.* at 498. For criticism of the *Klaxon* and *McCoach* cases, see WALTER WHEELER COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS c. V. (1940).

[50] Johnston v. Compagnie Generale Transatlantique, 242 N. Y. 381, 152 N. E. 121 (1926).

[51] 159 U. S. 113 (1895).

[52] *See* Cheatham, *Sources of Rules for Conflict of Laws,* 89 U. of PA. L. REV. 430, 447 (1941). *See* United States v. Belmont, 301 U. S. 324 (1937), United States v. Pink, 315 U. S. 203 (1942), on the power of the national government in foreign relations.

[53] REV. STAT. §914 (1875), 28 U. S. C. §724 (1940).

[54] 48 STAT. 1064 (1937), 28 U. S. C. §723(b) (1940).

[55] 302 U. S. 783 (1937). The Federal Rules of Civil Procedure are set out at 308 U. S. 663 (1940), and at 28 U. S. C. following §723(c) (1940).

[56] 48 STAT. 1064 (1937), 28 U. S. C. §723(b) (1940).

under the *Erie* doctrine it might well be labeled "substantive," and yet the matter is one of those provided for by the Rules?[57]

There are two possible solutions to the problem. First, it may be concluded that provision for a matter in the Rules is a determination by the Supreme Court that the matter is "procedural" and state law is not binding. Second, it may be recognized that since the decision in *Erie Railroad v. Tompkins* the prior determination by the Supreme Court is no longer conclusive in situations governed by the doctrine of that case.

At bottom the question is one of policy. It is necessary to balance the *Erie* doctrine against the policy underlying the Federal Rules. The line between "substance" and "procedure" must be drawn at a point which will carry out the policy chosen, and classifications perhaps valid for other purposes must be rejected[58]—the same process for which Professor Cook has so cogently argued in the field of conflict of laws.[59] In an increasing number of cases the federal courts have taken the second course suggested above, and have found the policy of the *Erie* case to be the weightier, as indicated by the cases considered below.

The rule which first raised the problem was 8(c), which provides for affirmative defenses, including contributory negligence. Prior to 1938, when the *Erie* case was decided and the rules were adopted, the federal rule was that the burden of proof of contributory negligence was "substantive" and a question of "general law" under *Swift v. Tyson.*[60]

In 1939 the Supreme Court indicated the effect of the *Erie* case upon this doctrine when it held in an equity case that the burden of proof of bona fide purchase in an action to quiet title was a matter of "substance," governed by the *Erie* case, and therefore that state law must be followed.[61] Four years later, the question was settled by the decision in *Palmer v. Hoffman,*[62] which held that federal courts in cases where the *Erie* doctrine applies must follow state law as to the burden of proof of contributory negligence. The Court said that Rule 8(c) governed only the manner of pleading, and not the burden of proof.

The same type of problem is raised by Rule 23(b), which provides that, in order to maintain a shareholder's derivative suit, the plaintiff must have been a shareholder at the time of the transaction complained of, or have acquired his shares since that time by operation of law.

[57] *See* Clark, *The Tompkins Case and the Federal Rules,* 1 F. R. D. 417 (1941); Holtzoff, *The Federal Rules of Civil Procedure and Erie Railroad v. Tompkins,* 24 J. AM. JUD. SOC'Y 57 (1940).

[58] In a conflict-of-laws case, two separate characterizations may be necessary: first, to determine whether the *Erie* doctrine requires that the law of the state be applied, and second, to determine the characterization which the state of the forum would make for conflict-of-laws purposes. *See* Sampson v. Channell, 110 F. 2d 754 (C. C. A. 1st 1940).

[59] COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 154 *et. seq.;* Tunks, *Categorization and Federalism: "Substance" and "Procedure" After Erie Railroad v. Tompkins,* 34 ILL. L. REV. 271 (1939).

[60] Central Vt. Ry. v. White, 238 U. S. 507 (1915).

[61] Cities Service Oil Co. v. Dunlap, 308 U. S. 208 (1939).

[62] 318 U. S. 109 (1943).

Among the states there is a wide split of authority on this requirement.[63] The federal rule is a continuation of Equity Rule 27, the history of which leaves in doubt whether it was regarded as "substantive" or "procedural."[64] The Supreme Court had held in 1908, however, that the lack of such a showing deprived the plantiff of standing in a court of equity.[65]

The question has been raised in a number of lower federal courts. Most of them have noted apparent conflict with the *Erie* doctrine, but have deferred to the authority of the Rules,[66] have avoided deciding because the state rule was the same,[67] or have merely commented upon the fact, without considering it.[68] At least one court has held the matter to be "substantive," and governed by state law,[69] and another has as flatly rejected this view.[70]

The Advisory Committee on the Federal Rules recently considered the advisability of amending Rule 23(b), but concluded that the question should be left to be determined by the Supreme Court when and if a case comes before it.[71]

It would seem that the requirement of Rule 23(b) does affect "substantive" rights for the purposes of the *Erie* doctrine, and state law should govern. Otherwise a plaintiff who cannot qualify under the federal rule, but who could maintain the suit under the state rule, could be defeated by removal, merely because of diversity of citizenship.

Rule 43 makes admissible all evidence which is admissible under any federal statute, or which was admissible under the old equity practice, or which is admissible in the courts of the state in which the federal court sits. That rule which favors admissibility is to be preferred.

Prior to 1938, matters of evidence depended upon the Competency of Witnesses Act,[72] the Rules of Decision Act,[73] and the Conformity Act.[74] There was some conflict as to which governed particular matters, and there was disagreement as to whether or not state decisional law of evidence was binding upon federal courts.[75]

[63] Annotation, 148 A. L. R. 1091 (1944).

[64] *See* 2 MOORE AND FRIEDMANN, MOORE'S FEDERAL PRACTICE 2246-2253 (1938), for a statement of the development of this rule.

[65] Venner v. Great Northern Ry., 209 U. S. 24 (1908). Dean, then Commissioner, Pound concluded that the requirement was "substantive." Home Fire Ins. Co. v. Barber, 67 Nebr. 644, 93 N. W. 1024 (1903).

[66] Summers v. Hearst, 23 F. Supp. 986 (S. D. N. Y. 1938).

[67] McQuillen v. National Cash Register Co., 112 F. 2d 877 (C. C. A. 4th 1940); Mullins v. DeSoto Securities Co., 45 F. Supp. 871 (W. D. La. 1942).

[68] *In re* Western Tool and Mfg. Co., 142 F. 2d 404 (C. C. A. 6th 1944); Piccard v. Sperry Corp., 36 F. Supp. 1006 (S. D. N. Y. 1941).

[69] Gallup v. Caldwell, 120 F. 2d 90 (C. C. A. 3rd 1941).

[70] Perrott v. United States Banking Corp., 53 F. Supp. 953 (Dela. 1944).

[71] *Report of Proposed Amendments to Rules of Civil Procedure by Advisory Committee*, 5 F. R. D. 449, 451 (1946).

[72] REV. STAT. §858 (1875), 28 U. S. C. §631 (1940).

[73] REV. STAT. §721 (1875), 28 U. S. C. §725 (1940).

[74] REV. STAT. §914 (1875), 28 U. S. C. §724 (1940).

[75] *See* Thompson v. Railroad Companies, 6 Wall. 134 (U. S. 1867) (must follow state decisions); Conn. Mutual Life v. Shaefer, 94 U. S. 457 (1876) (competency of witness is governed by federal law); *but see* Chicago and N. W. R. R. v. Kendall, 167 Fed. 62 (C. C. A. 8th 1909) (state decisions on common-law rules of evidence not binding on federal courts).

Under the *Erie* case the courts have concluded that some evidentiary matters are so intimately tied up with the result of the action that state law must be followed regardless of any choice offered by Rule 43. This has been held in regard to the parol evidence rule,[76] res ipsa loquitur,[77] the presumption of death after an absence of seven years,[78] privileged communications,[79] sufficiency of evidence,[80] and the burden of proof on the issue of suicide or accident.[81] There have been cases holding that the state rule as to judicial notice of foreign law will govern,[82] but it would seem that the better view is to the contrary,[83] since judicial notice of foreign law merely relieves one of the parties from the burden of proving it, and does not necessarily change the result.

Outside the area covered by the Federal Rules, questions of "substance" and "procedure" are encountered in applying the doctrines of forum non conveniens and "internal affairs."[84] These doctrines have become so intertwined and present so many features in common that they may be considered together for purposes of discussion of their application under the *Erie* case.

The Supreme Court has three times avoided ruling whether or not the *Erie* case requires a federal court exercising diversity jurisdiction to follow the state law in these cases.[85] But the Court did decide, in 1947, that federal venue statutes do not preclude federal courts from applying the doctrine of forum non conveniens, thus removing one possible objection to the application of state law.[86] If statutory venue provisions can be made to yield at all to judicial concepts of convenience, there is no apparent reason, in the light of the *Erie* policy, why they should not yield when the concepts are those of state judges.

Judge Learned Hand, in *Weiss v. Routh*,[87] held that state law should govern the application of forum non conveniens, and clearly stated the reasons for that conclusion. He pointed out that a purpose of the *Erie* doctrine was to avoid a different result because of diversity, and that this "extends as much to determining whether the court shall act at all, as to how it shall decide, if it does."[88]

[76] Russell v. Barnes Foundation, 143 F. 2d 871 (C. C. A. 3rd 1944); Zell v. American Seating Co., 138 F. 2d 641 (C. C. A. 2d 1943); Long v. Morris, 128 F. 2d 653 (C. C. A. 3rd 1942).

[77] Coca-Cola Bottling Co. v. Munn, 99 F. 2d 190 (C. C. A. 4th 1938).

[78] Occidental Life Ins. Co. v. Thomas, 107 F. 2d 876 (C. C. A. 9th 1939).

[79] Munzer v. Swedish American Line, 35 F. Supp. 493 (S. D. N. Y. 1940).

[80] Waldron v. Aetna Casualty and Surety Co., 141 F. 2d 330 (C. C. A. 3rd 1943); Cooper v. Brown, 126 F. 2d 874 (C. C. A. 3rd 1942); Sheinmann and Sons v. Scranton Life Ins. Co., 125 F. 2d 341 (C. C. A. 3rd 1939); Allison v. Great Atlantic and Pacific Tea Co., 99 F. 2d 769 (C. C. A. 4th 1940).

[81] Ryan v. Denver Union Terminal Ry. Co., 126 F. 2d 782 (C. C. A. 10th 1942); Rast v. Mutual Life Ins. Co., 112 F. 2d 769 (C. C. A. 4th 1940).

[82] Sheinmann and Sons v. Scranton Life Ins. Co., *supra* note 80; Affiliated Enterprises v. Courter Amusement Co., 32 F. Supp. 11 (E. D. N. Y. 1940).

[83] Alcaro v. Jean Jordan, 138 F. 2d 90 (C. C. A. 3rd 1941).

[84] See Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947).

[85] Williams v. Green Bay and W. R. R., 326 U. S. 549 (1946); Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947); Koster v. Lumberman's Mutual Casualty Co., 330 U. S. 518 (1947); Note, *The Development of the "Internal Affairs" Rule in the Federal Courts*, 46 COL. L. REV. 413 (1946).

[86] Gulf Oil Corp. v. Gilbert, *supra*, note 85.

[87] 149 F. 2d 193 (C. C. A. 2d 1945).

[88] *Id.* at 195.

The results in the lower courts are inconclusive,[89] but at least show an awareness of the problem. Judge Hand's position would seem to be in accord with the policy of the *Erie* case.

V

Until 1947, it was not generally supposed that the doctrine of *Erie Railroad v. Tompkins* had any effect upon the extent of the jurisdiction of federal courts. Since 1938 lower federal courts had continued to apply the doctrine of the *Lupton* case,[90] that a state statute limiting the jurisdiction of state courts did not operate to limit the jurisdiction of federal courts in diversity cases.[91]

In 1947 the Supreme Court, in *Angel v. Bullington*,[92] declared that the *Lupton* case is "obsolete," and held that when a state denies to its courts jurisdiction to hear certain causes of action, a federal district court sitting in that state cannot entertain them. Justice Frankfurter wrote:

> The essence of diversity jurisdiction is that a federal court enforces State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. . . . A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld.[93]

While there was another ground of decision—that the judgment in a prior suit between the same parties in the state courts, in which the highest state court held that the state courts lacked jurisdiction to hear the cause of action, was res judicata—Justice Frankfurter for the majority placed great stress upon denial of jurisdiction through the operation of the *Erie* doctrine.

It had already been pointed out by the Court that the *Erie* case did more than overrule *Swift v. Tyson*—that it also overruled "a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."[94] *Angel v. Bullington* would seem to follow logically from this major premise. If the federal court in diversity cases is able to entertain a cause of action which cannot be heard by the courts of the state in which it sits, then suit in a federal court would produce a different result, merely because of the "accident of diversity."

[89] Gilbert v. Gulf Oil Corp., 153 F. 2d 883 (C. C. A. 2d 1946) (local law does not control); Gilbert v. Gulf Oil Corp., 62 F. Supp. 291 (S. D. N. Y. 1945) (local law does control); Lewald v. York Corp., 68 F. Supp. 386 (S. D. N. Y. 1945) (would not decide since result the same); Hall v. American Cone and Pretzel Co., 71 F. Supp. 266 (E. D. Pa. 1947) (refused to follow state law).

[90] David Lupton's Sons v. Automobile Club of America, 225 U. S. 489 (1912).

[91] Stephenson v. Grand Trunk Western R. Co., 110 F. 2d 401 (C. C. A. 7th 1940); Martineau v. Eastern Airlines, 64 F. Supp. 235 (N. D. Ill. 1946).

[92] 330 U. S. 183 (1946), 60 HARV. L. REV. 822 (1947). *See* Harper, *The Supreme Court and the Conflict of Laws*, 47 COL. L. REV. 883, 890 (1947).

[93] *Id.* at 191.

[94] Guaranty Trust Co. v. York, 326 U. S. 99, 109 (1945).

VI

The federal equity jurisdiction is said to be identical in extent with that of the English Court of Chancery at the time of the Revolution.[95] It has been repeatedly held that state laws cannot increase or diminish this jurisdiction by creating or abolishing remedies.[96] A state may, however, create new "substantive" rights which may be enforced in federal courts of equity.[97] If the state at the same time prescribes a remedy to enforce the right, and the remedy is substantially consistent with ordinary modes of procedure, then federal courts may give such remedy.[98] All of the foregoing is subject to the statutory requirement that suits in equity shall not be sustained where a plain, adequate, and complete remedy may be had at law.[99] The remedy at law must be one available in the federal court, and not merely in the state courts.[100] Federal equity jurisdiction is further circumscribed by the constitutional requirement of trial by jury in actions traditionally legal.[101]

Although the Rules of Decision Act by its terms applied only to "trials at common law," the Supreme Court had declared that the enactment was merely declaratory of existing law, and did not by implication exclude equity cases;[102] and, by reasoning analogous to that in *Swift v. Tyson,* federal courts were freed from dependence on the pronouncements of state courts as rules of decision in equity cases as well. Prior to 1938 federal courts were as free to disregard state decisional law in equity as in cases at law.[103]

In the *Ruhlin* case,[104] decided within a week after *Erie v. Tompkins,* the Supreme Court applied the new doctrine to a question arising in an equity case. It did not hold, however, that equitable questions were governed by the *Erie* doctrine, but only that when in an equity case a question arose which would have been one of "general" law prior to the *Erie* case, state law must now be followed. The same cautious approach was used in the next equity case decided, *Cities Service Oil v. Dunlap,*[105] in which the Court held that the burden of proof of bona fide purchase in an action to quiet title was "substantive," and not merely a matter of equity practice, and state law must be followed.

Having once avoided the problem of the application of the *Erie* doctrine to an exclusively equitable question,[106] the Court in 1945 met the issue squarely in *Guaranty Trust Company v. York.*[107] It held that the state statute of limitations should be

[95] Atlas Ins. Co. v. W. I. Southern Inc., 306 U. S. 563 (1939).
[96] Henrietta Mills v. Rutherford County, 281 U. S. 121 (1930); Pusey and Jones Co. v. Hanssen, 261 U. S. 491 (1923).
[97] Missouri, K. & T. Trust Co. v. Krumseig, 172 U. S. 351 (1899).
[98] Clark v. Smith, 13 Pet. 195 (U. S. 1839).
[99] REV. STAT. §723 (1875), 28 U. S. C. §384 (1940).
[100] Atlas Ins. Co. v. W. I. Southern, *supra,* note 95.
[101] Scott v. Neely, 140 U. S. 106 (1891).
[102] Mason v. United States, 260 U. S. 545 (1923).
[103] Neves v. Scott, 13 How. 268 (U. S. 1851).
[104] Ruhlin v. New York Life Ins. Co., 304 U. S. 202 (1938).
[105] 308 U. S. 208 (1939).
[106] Russell v. Todd, 309 U. S. 280 (1940).
[107] 326 U. S. 99 (1945).

applied in a class suit for breach of trust. Justice Frankfurter, who wrote the opinion, first reiterated traditional ideas of equity jurisdiction, and said that state law cannot define the remedies which a federal equity court may afford in diversity jurisdiction. But, he continued, it was immaterial whether statutes of limitation be classified as "substantive" or "procedural":

> *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between state and federal courts. In essence the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.[108]

Is the import of this language consistent with traditional ideas of federal equity jurisdiction? Justice Frankfurter decried an exception to the *Erie* doctrine in equity cases,[109] and closed his opinion by saying, "Dicta [which] may be cited characterizing equity as an independent body of law . . . merely reflect notions that have been replaced by a sharper analysis of what federal courts do when they enforce rights that have no federal origin."[110] If the policy underlying the *Erie* doctrine is as compelling as this language implies, must not equitable remedies which are available in state courts be available in federal courts sitting in diversity jurisdiction if the lack of such remedies would lead to a different result in the federal courts?

The scope of the *York* decision is not clear, especially since the decision in *Angel v. Bullington,* which established that, in some measure at least, the jurisdiction of federal courts in diversity jurisdiction is dependent upon state law. It would seem at least arguable that the traditional statements of federal equity jurisdiction in diversity cases are no longer entirely valid.[111]

VII

Before *Erie Railroad v. Tompkins,* federal courts were free to disregard state decisions under certain circumstances although the case was not one which fell into the category of "general law." When a state decision had been rendered subsequent to the judgment of a lower federal court, but pending appeal, federal judges were not bound to follow the latest decision,[112] although they sometimes did so.[113] When a state decision invalidated contract rights previously held to be valid, federal courts were free to ignore the subsequent decision.[114] The decisions of intermediate state

[108] *Id.* at 109. [109] *Id.* at 111. [110] *Id.* at 112.

[111] It has been pointed out that some lower federal courts avoid application of the *Erie* doctrine in equity cases. Note, *The Equitable Remedial Rights Doctrine,* 55 YALE L. J. 401 (1946). *See* Purcell v. Summers, 145 F. 2d 979 (C. C. A. 4th 1944); Black and Yates, Inc. v. Mahogany Ass'n., 129 F. 2d 227 (C. C. A. 3rd 1941).

[112] Burgess v. Seligman, 107 U. S. 20 (1882).

[113] Moores v. National Bank, 104 U. S. 625 (1881).

[114] Gelpcke v. Dubuque, 1 Wall. 175 (U. S. 1863). This case has never been overruled, but it is doubtful that it will ever again be followed, as it is wholly inconsistent with the *Erie* doctrine.

courts were not binding on federal tribunals,[115] although they were sometimes followed.[116]

There were basic conflicts between these doctrines and the *Erie* case.[117] Within a period of about thirty days at the end of 1940 and the beginning of 1941, the Supreme Court in a series of cases overthrew the old doctrines.[118] It held that federal courts are bound to follow decisions of intermediate state courts in the absence of decisions of the highest state court, and of more convincing evidence of the law of the state.[119] The Court also laid down, in *West v. American Telephone & Telegraph Company*,[120] guides for the ascertainment of state law. Justice Stone declared that:

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or another is preferable.[121]

And he continued:

> Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.[122]

In *Vandenbark v. Owens-Illinois Glass Company*,[123] the Court held that where a decision of the highest state court was delivered after judgment in the district court, but before decision in the Circuit Court of Appeals, the Circuit Court of Appeals was bound to follow the state decision.

In *Meredith v. Winter Haven*,[124] the Supreme Court made it plain that federal courts may not avoid decision of disputed questions of state law upon which there is no authority merely because of the difficulty of ascertaining the law.[125]

[115] Summers v. Travelers Ins. Co., 109 F. 2d 845 (C. C. A. 8th 1940); Knight v. Atlantic Coast Line R. R., 73 F. 2d 76 (C. C. A. 5th 1934).

[116] Erie R. R. v. Hilt, 247 U. S. 97 (1918).

[117] *See* Note, *Erie R. R. v. Tompkins and Supervening Changes in State Law*, 50 YALE L. J. 315 (1940).

[118] Fidelity Union Trust Co. v. Field, 311 U. S. 169 (1940); Six Companies of California v. Joint Highway Dist., 311 U. S. 180 (1940); West v. American Telephone and Telegraph Co., 311 U. S. 223 (1940).

[119] Fidelity Union Trust Co. v. Field, *supra*, note 118.

[120] Cited *supra*, note 118.

[121] *Id.* at 236, 237.

[122] *Id.* at 237. *See also* Stoner v. New York Life Ins. Co., 311 U. S. 464 (1940).

[123] 306 U. S. 103 (1939).

[124] 320 U. S. 228 (1943); *see* Note, *Recent Supreme Court Limitations on Federal Jurisdiction*, 53 YALE L. J. 788 (1944).

[125] Cases in which it is held that a federal court should not decide questions of state law because an important state policy is involved, or because a state statute has not been construed by state courts, represent a special doctrine, and must be distinguished from the *Winter Haven* case. *See* American Federation of Labor v. Watson, 327 U. S. 582 (1947); Burford v. Sun Oil Co., 319 U. S. 315 (1943); Chicago v. Fieldcrest Dairies, 316 U. S. 168 (1942); Railroad Commission of Texas v. Pullman Co., 312 U. S. 496 (1941); Note, *Recent Supreme Court Limitations on Federal Jurisdiction*, 53 YALE L. J. 788 (1944).

Although the rules laid down by the Supreme Court for the determination of state law have been sharply attacked as unduly circumscribing the judicial discretion of federal judges,[126] lower federal courts have shown a great deal of flexibility in their search for state law. Since the Supreme Court has indicated that it will, if possible, defer to the judgment of lower federal judges on disputed matters of state law,[127] district and circuit judges have a high degree of freedom in this matter.[128]

There are three possible situations confronting the federal judge when he undertakes to ascertain state law. First, the highest state court may have spoken on the point. Second, in the absence of decision by the highest state court, there may be decisions by intermediate state courts. Third, there may be an entire absence of state authority upon the point.

In the first situation the duty of the federal court is clear. It must follow the state decision.[129] But even here the federal court may disregard the decision if it concludes from an examination of later state decisions that the highest state court would no longer follow its earlier opinion.[130]

When there are only intermediate state court decisions, federal courts must then turn to them.[131] Although some courts have followed intermediate state decisions even though they rather obviously disagreed with them,[132] federal courts are not required to follow blindly.[133] They are free to examine other pertinent data, as did the Fourth Circuit Court of Appeals in a recent case, and find that the state law is not as the intermediate state court says.[134] Some federal judges have noted that they followed these decisions only in the absence of other convincing evidence,[135] or because the highest state court had refused to review the decision.[136]

It is in the third type of case, where there is an absence of state authority, that the

[126] Corbin, *The Laws of the Several States*, 50 YALE L. J. 762 (1941); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L. J. 267 (1946); Broh-Kahn, *Uniformity Run Riot—Extensions of the Erie Case*, 31 KY. L. J. 99 (1943).

[127] Steele v. General Mills, 329 U. S. 433 (1947): Huddleston v. Dwyer, 322 U. S. 232 (1944); MacGregor v. State Mutual Life Assur. Co. 315 U. S. 280 (1942).

[128] *See* LaSalle, *The Problem Facing Federal Courts Where State Precedents Are Lacking*, 24 TEX. L. REV. 361 (1946).

[129] West v. American Telephone and Telegraph Co., 311 U. S. 223 (1940). *See* American Nat. Ins. Co. v. Belch, 100 F. 2d 48 (C. C. A. 4th 1938), where on rehearing court withdrew former opinion when shown a state decision newly discovered by counsel.

[130] West v. American Telephone and Telegraph, *supra*, note 129, Moore v. Illinois Central R. R., 312 U. S. 630 (1941) (implication); *contra:* Grand Trunk Western R. R. v. Nelson Co., 118 F. 2d 252 (C. C. A. 6th 1941), which would seem to be erroneous.

[131] West v. American Telephone and Telegraph, *supra*, note 129.

[132] Gustin v. Sun Life Assur. Co., 152 F. 2d 447 (C. C. A. 6th 1945).

[133] Wickes Boiler Co. v. Godfrey-Keeler Co., 121 F. 2d 415 (C. C. A. 2d 1941) (Circuit Court of Appeals on first hearing followed New York Appellate Division case with which it disagreed. Upon appeal the New York Court of Appeals carefully avoided approving the view which the Circuit Court of Appeals had followed, but affirmed on other grounds. Circuit Court of Appeals granted rehearing and changed its former opinion).

[134] Order of Commercial Travelers of America v. King, 161 F. 2d 108 (C. C. A. 4th 1947).

[135] Gustin v. Sun Life Assur. Co., 154 F. 2d 447 (C. C. A. 6th 1946). Miller v. National City Bank, 69 F. Supp. 187 (S. D. N. Y. 1946).

[136] Gustin v. Sun Life Assur. Co., 152 F. 2d 447 (C. C. A. 6th 1945).

federal courts have freest rein. Judges have stated that under such circumstances they will rely upon "a general statement of the law,"[137] upon authorities from other jurisdictions,[138] or will proceed by analogy to other state decisions.[139] One Circuit Court of Appeals, in the absence of state authority, has in the finest common law tradition created a new cause of action.[140]

The policy underlying *Erie Railroad v. Tompkins* does not require that in the absence of state authority federal courts achieve mathematical identity with what a state court may in the future declare to be the law of the state. To achieve such a result would require the services of clairvoyants rather than judges. Any incongruity in the individual case arising from the fact that a federal court decides the rights of the parties upon the assumption that the state law is one way, and the state courts later, and in another case, decide that the principle is to the contrary, is inherent in a federal system providing for dual courts with concurrent jurisdiction. When the state court does speak, the federal court must follow. Until that time, the most that a federal judge can do is, as Judge Parker puts it:

> . . . to consider that question in the light of the common law of the state, with a view of reaching the decision which reason dictates, and with the faith that the local court will reach the same decision when the question comes before it.[141]

VIII

On the same day that *Erie Railroad v. Tompkins* was decided, Justice Brandeis also delivered the opinion of the Court in *Hinderlider v. LaPlata River and Cherry Creek Ditch Company*,[142] in which he said that the apportionment of the water of an interstate stream "is a question of 'federal common law,' upon which neither the statutes nor the decisions of either State can be conclusive."[143]

This case served to emphasize the fact that, as before *Erie*,[144] there are "federal fields," governed by "federal common law." There are cases to which, because an interest of the United States is involved,[145] because of the sweep of a federal

[137] Hornstein v. Kramer Bros. Freight Lines, 133 F. 2d 143 (C. C. A. 3rd 1943).

[138] Kansas City Life Ins. Co. v. Wells, 133 F. 2d 224 (C. C. A. 8th 1943).

[139] Versluis v. Town of Haskell, 154 F. 2d 935 (C. C. A. 10th 1946).

[140] Dailey v. Parker, 152 F. 2d 174 (C. C. A. 7th 1945), holding that children had a cause of action for alienation of affections against woman for whom their father had abandoned them. *See* Fitzgerald, *The Celebrated Case of Dailey v. Parker*, 15 U. of KAN. CITY L. REV. 120 (1947). A lower Illinois court has recently followed the Seventh Circuit, Johnson v. Luhman, 71 N. E. 2d 810 (1947).

[141] New England Mutual Life Insurance Co. v. Mitchell, 118 F. 2d 414, 420 (C. C. A. 4th 1941). Compare the approach of Frank, J., in Cooper v. American Airlines, Inc., 149 F. 2d 355, at 359 (C. C. A. 2d 1945): "What would be the decision of reasonably intelligent lawyers, sitting as judges of the highest New York court, and fully conversant with New York 'jurisprudence'? An alternative test is what we conjecture would be the decision of the particular judges who now constitute that court."

[142] 304 U. S. 92 (1938).

[143] *Id.* at 110.

[144] Board of Trade v. Johnson, 264 U. S. 1 (1924); Economy Light and Power Co. v. U. S., 256 U. S. 113 (1921); Chelentis v. Luckenbach Steamship Co., 247 U. S. 372 (1918).

[145] United States v. Standard Oil of California, 332 U. S. 301 (1947) (right of United States to recover medical expenses incurred in caring for soldier injured through negligence of defendant, although Court held that there was no such cause of action); Clearfield Trust Co. v. United States, 318 U. S. 363 (1943) (right of United States to recover payment made on forged government check); Board of

statute,[146] or because Congress has "occupied the field,"[147] state law has no application. They are not "exceptions" to *Erie Railroad v. Tompkins,* but are outside the rationale of the case. They concern rights created by the Federal Government, and not rights created by the states.[148] The Rules of Decision Act by its terms did not apply to cases "where the Constitution, treaties, or statutes of the United States otherwise require or provide. . . ." On the contrary, in these fields state courts are bound to follow the decisions of federal courts.[149]

It is impossible to predict the eventual extent of the "federal fields" doctrine. There are strong reasons of policy for uniformity of decision in certain areas of activity over which the Federal Government has extended its regulatory powers. There seems to be some tendency for federal courts to extend the concept of exclusively federal questions. A degree of the uniformity desired by the defenders of *Swift v. Tyson* may some day be achieved in reverse, by state courts' following federal decisional law in greatly expanded "federal fields."

IX

During the ten years which have passed since they were required to make two basic readjustments in their operating procedures, lower federal courts have been almost surprisingly conscientious in the application of *Erie Railroad v. Tompkins* and its offspring. It has no doubt been difficult for many federal judges, traditionally among the ablest of our jurists, at times to subordinate their own ideas to the pronouncements of state courts.

County Commissioners v. United States, 308 U. S. 343 (1939) (right of United States to recover interest on taxes illegally collected by local government from Indian); Girard Trust So. v. United States, 149 F. 2d 872 (C. C. A. 3rd 1945) (rights of United States as lessee of property). *See,* Eisenhart, *Federal Decisional Law Independent of State Common Law Since Erie v. Tompkins,* 9 GEO. WASH. L. REV. 465 (1941.)

[146] Vanston Bondholders Protective Comm. v. Green, 329 U. S. 156 (1946) (whether bondholder may be paid interest on interest after default is a federal question when presented in bankruptcy case); Heiser v. Woodruff, 327 U. S. 726 (1946) (provability of claim in bankruptcy is governed by federal law); United States v. Waddill, Holland and Flinn, 323 U. S. 353 (1945) (whether another lien was so far perfected before bankruptcy as to be superior to federal tax lien is federal question); Holmberg v. Ambrecht, 327 U. S. 392 (1946) (liability of shareholders of joint stock land bank is not governed by state law); D'Oench, Duhme, and Co. v. FDIC, 315 U. S. 447 (1942) (liability on note given bank is federal question under Federal Reserve Act, when bank was insured by FDIC); American Surety Co. v. Bethlehem National Bank, 314 U. S. 314 (1941) (effect of illegal pledge of assets of national bank is federal question); Dietrick v. Greaney, 309 U. S. 190 (1940) (defense to a note given national bank in contravention of policy of National Banking Act is question of federal law).

[147] Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 (1942) (in field of patents, federal policy covers the field, and state rules do not govern estoppel of licensee of patent to challenge its validity); O'Brien v. Western Union, 113 F. 2d 539 (C. C. A. 1st 1940) (action against telegraph company for libel is governed by federal law because telegraph companies subject to extensive federal regulation); *accord,* Vaigneur v. Western Union, 34 F. Supp. 92 (E. D. Tenn. 1940) (action for negligence); Francis v. Southern Pacific R. R., 162 F. 2d 813 (C. C. A. 10th 1947) (effect of stipulations in pass issued to railroad employee pursuant to Hepburn Act is matter of federal law).

[148] The term "federally created right" is not an entirely satisfactory one. In at least one situation federal decisional law may be applied although Congress has no power to legislate in the field. *See* Kansas v. Colorado, 206 U. S. 46 (1907).

[149] Second Employers Liability Case, 223 U. S. 1 (1912).

In spite of an occasional departure from strict application,[150] the *Erie* doctrine has largely accomplished its purpose. In diversity jurisdiction, federal district courts now administer, as nearly as it is practically possible to do so, the same law as do the courts of the state in which they sit. Forum-shopping for substantive law has been eliminated.[151] In non-diversity cases, state-created rights no longer have one set of consequences in the courts of the sovereign which created them and another in the courts of the Federal Government. While some of its ramifications are still unsettled, *Erie Railroad v. Tompkins* is a firmly established doctrine of our federal system of government.

[150] *See* Purcell v. Summers, 145 F. 2d 979 (C. C. A. 4th 1944), where the court characterized a previous denial of an injunction by a state supreme court as only a finding of fact, and declared that the state law was to the contrary.

[151] Professor Cook points out that under the Federal Interpleader Act some degree of forum-shopping is possible. COOK, LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS, at 129, 130.

THE ADMINISTRATION OF THE FEDERAL COURTS

HENRY P. CHANDLER*

THE TREND TOWARD ADMINISTRATIVE COORDINATION

The lower federal courts have always enjoyed a relatively high degree of autonomy in matters of administration.[1] This independence rests upon (1) the power of each court to appoint and remove, and thus to control the conduct of, its administrative officers;[2] (2) a tradition of individuality and continuity in administration;[3] and (3) a recognition of the value in an administrative scheme of flexibility sufficient to permit its adaptation to differing local conditions and preferences.[4]

The diversity of administrative practices among federal courts is in many respects necessary and desirable. The United States is a large country. People in different sections do business in different ways and at different speeds. Particularly are there

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[1] Compare the unifying control exercised by the Supreme Court over the performance of the judicial function. Even where adherence to local law has been the rule for procedure (REV. STAT. §914 (1875)), or substance (Erie R. R. v. Tompkins, 304 U. S. 64 (1938)), the Supreme Court has interpreted the principle of conformity and controlled its application.

[2] Under present statutes, clerks and court reporters for the district courts are appointed by the senior district judge of the court served if there is more than one judge (28 U. S. C. §6 and §9a(a) (Supp. 1946)). The bill now pending (H. R. No. 3214, 80th Cong., 1st Sess. (1947)) to revise Title 28 of the Code would place the power to appoint these officers in the court (§§751 and 753) with a provision that when a majority of the judges of any district court cannot agree, the chief judge (corresponding to the present senior district judge) shall make the appointment (§756).

[3] Since there is no sharp differentiation between matters of administration and matters of procedure, the years of operation under the principle of conformity with state practice contributed to the development of individuality in administration among the district courts. Even now, local rules not inconsistent with the Federal Rules of Civil Procedure are expressly permitted (Rule 83). Thus the circuit courts of appeals differ in their requirements as to the printing of the record; the district courts differ in their arrangement of the calendars and in the provisions made for assignment of cases to individual judges. Differences are also found from court to court in the provision of juries, in the practice in instructing juries, in the holding of pretrial conferences, in expediting the disposition of cases on the docket, and in the degree to which the work of such administrative personnel as clerks and probation officers is supervised.

[4] In 1942 the Judicial Conference of Senior Circuit Judges rejected, as an unwise interference with the judges in the administration of their courts, a committee proposal that the personnel of the clerks' offices (except the clerks themselves and their chief deputies) be brought within the classified civil service. REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 10 (1942). Since the purpose of the recommendation was to provide increased security of tenure for the rank and file of the employees, it should be pointed out that instances in which administrative personnel are disturbed in consequence of changes in the court are comparatively few. A study made in 1943 showed that of 104 federal court clerks, 71 had served more than five years; of these, 25 had served from six to ten years, 18 from eleven to fifteen years, 13 from sixteen to twenty years, and the remaining 15 for longer periods. The sentiment appears to be increasing among the federal judiciary that clerks and other administrative officers should be retained in their positions as long as they perform their duties satisfactorily, notwithstanding changes in the judgeships.

differences between urban communities and rural areas, where the pace of life is more leisurely. The federal courts need the power which they have of adapting their methods to these differences in local conditions.

On the other hand this diversity has some disadvantages. One of the most marked is the disparity between different districts in the burden of judicial business. There is at least one federal judicial district for every state. As a result there are some single districts in states of small population in which the work is light. This is true also of some additional districts which were created within a state for reasons persuasive to Congress at the time, but which would hardly be warranted today if the judicial districts were being laid out *de novo*. There are other districts in which population and commerce are on the rise and the courts are burdened by more business than they can well handle. The independence of the courts in their administration permits laxity in the conduct of administrative offices like those of the clerks, if the courts concerned are not interested. The course of justice may become sluggish and litigants be injured by delay if the courts are complacent about the flow of their business and are disposed to give the lawyers a free hand in the matter. Where each court may largely shape its administrative procedure along its own lines without regard to that in other courts, practices in different parts of the country may differ so widely that the variance causes substantial inconvenience to litigants and counsel, and increases the expense of litigation. Without some impulse from the center transmitted to the parts, improvements in methods may be blocked and progress retarded. The dissemination throughout the system of new ideas in administration that may be developed in one court is difficult if there is not a central agency to serve as a clearing-house.

Considerations such as these have brought about in the last twenty-five years a trend toward greater coordination of the federal courts. This has been reflected principally in three ways: (1) in the establishment of the Judicial Conference of Senior Circuit Judges in 1922, and of the judicial conferences and councils in the circuits in 1939; (2) in the grant to the Supreme Court of the rule-making power and the adoption of the Rules of Civil Procedure in 1938, and of the Rules of Criminal Procedure in 1946; (3) in the establishment of the Administrative Office of the United States Courts in 1939. The purpose of this paper is to discuss the work of the judicial conferences and councils and the Administrative Office.

The major reliance for improving the judicial administration through these agencies is placed upon the voluntary cooperation of the courts rather than upon any powers of compulsion. There are some matters of administration in which decisions binding upon the judges may be made by the agencies mentioned; but many of their important functions are advisory, and in large part they pursue their aims by endeavoring to persuade the judges to take the requisite action. The effort is essentially to develop a strengthened *esprit de corps*, to gain greater effectiveness in the judicial system as a whole without impairing the vitality of the parts.

THE JUDICIAL CONFERENCES AND COUNCILS

The principal author of the Judicial Conference of Senior Circuit Judges was the late Chief Justice William Howard Taft, and the principal reason for creating it was to give flexibility to the force of federal judges. As has been observed, there is a wide difference in the volume of business of the federal courts in different districts, and consequently a wide disparity in the burden per judge. Formerly there were only limited means for bringing aid to courts that were in arrears from judges in other districts or circuits who had some surplus time. The act creating the Judicial Conference was designed to supply such a mechanism.

The statute did two things: first, it provided that once a year, upon the call of the Chief Justice and under him as chairman, there should be held a conference of the senior circuit judges of the several circuits (the presiding judges of the circuit courts of appeals). This conference was to make a comprehensive survey of the condition of business in the federal courts and determine what courts might be in need of help, and what courts might be in position to spare some of their judges temporarily in order to give it. Second, the act prescribed a procedure for the temporary assignment of judges from one district or circuit to another. Within circuits it provided that such assignments might be made by the senior circuit judge. From one circuit to another it empowerd the Chief Justice to make them, upon a certificate of need from the senior circuit judge of the circuit seeking help, and the consent of the senior circuit judge of the circuit willing to give it.[5] Chief Justice Taft described this primary purpose of the Judicial Conference of Senior Circuit Judges as follows:

> The provisions allow team work. They throw upon the council of judges, which is to meet annually, the responsibility of making the judicial force in the courts of first instance as effective as may be. They make possible the executive application of an available force to do a work which is distributed unevenly throughout the entire country. It ends the absurd condition, which has heretofore prevailed, under which each district judge has had to paddle his own canoe and has done as much business as he thought proper.[6]

Having created the Judicial Conference of Senior Circuit Judges, the statute went beyond the immediate occasion and gave to that body general power to "submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business." As time has gone on, this provision has become more and more important. Under it the Conference has made recommendations to the courts in regard to procedures, such as pretrial conferences; matters of administration, such as the qualifications of probation officers; and matters of legislation affecting the courts. In later years the Conference has been given administrative powers, such as the power to approve the annual budget for the circuit courts of appeals and the district courts and the power to fix the number and prescribe the salaries of referees in bankruptcy and court reporters for the district courts.

Following the creation of the Judicial Conference of Senior Circuit Judges, that

[5] 42 STAT. 838 (1922), as amended, 28 U. S. C. §218 (1940).
[6] 6 J. AM. JUD. SOC'Y 37 (1922).

body was supplemented by coordinating bodies in the circuits which were better qualified, by their familiarity with local conditions, to deal with problems within the respective regions. Such a mechanism was a logical way of avoiding over-centralization and promoting responsible participation in the judicial system in the various areas. The Administrative Office Act in 1939 undertook to do this by providing for judicial conferences in the several circuits once a year and also for judicial councils in the circuits.[7]

Each judicial conference consists of all the circuit and district judges of the circuit, and of representatives of the bar selected in a manner determined by the circuit court of appeals. In all the circuits the judges hold at least one executive session at which matters pertaining to the internal affairs of the courts are discussed, usually with a representative of the Administrative Office of the United States Courts in attendance. The conferences of almost all of the circuits hold some open sessions for consideration of developments in relation to the federal courts, such as the Civil or Criminal Rules, sentencing procedures, and many others. In some circuits pains are taken to procure not only the presence but the active participation of representative members of the bar. The statute plainly contemplates this, and it is desirable not only because the lawyers can make a valuable contribution to the discussions, but because their interest will broaden the base of public understanding and support of the courts. Under a policy adopted by the Judicial Conference of Senior Circuit Judges, the circuit conferences have become a forum for the consideration of legislation recommended by that body or its committees, and a means of ascertaining the sentiment of the judges in the different circuits in regard to such matters.

The main purpose of the judicial councils in the circuits, as prescribed in the Administrative Office Act, is to consider the state of the judicial business within the circuits as shown in the periodic reports of the Administrative Office, and to take such action "as may be necessary" to correct any deficiencies which appear in the handling of the work. This may involve advice to the senior circuit judge in reference to the temporary assignment of judges from other districts within the circuit to courts in arrears, or a request to the Chief Justice of the United States for the temporary assignment of judges from other circuits. In some instances in which district judges have held cases under advisement for excessively long periods after submission, the judicial councils have directed them to devote themselves exclusively to the decision of such cases until they were disposed of, and have arranged for the assignment of other judges to take their current calendars in the meantime. The act makes it the duty of the district judges of the circuit "promptly to carry out the directions of the council as to the administration of the business of their respective courts." This gives the judicial councils a broad power to supervise and direct the administration of the federal courts in the respective circuits, to the end that the business may be effectively and expeditiously transacted.

[7] 53 STAT. 1223 (1939), 28 U. S. C. §§448-449 (1940).

THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

There were two principal reasons for the establishment of the Administrative Office of the United States Courts: first, to place the business management of the courts in an agency under their control rather than in the Department of Justice in the executive branch of the government, where it had been before; second, to provide for a service of information and statistics, also by an agency of the courts.

In the beginning the federal judicial organization was small and the management of its business was a simple task. It is not strange that as a matter of convenience this function was assigned to other agencies. For a long time it had been handled by the Department of Justice. However, as the business of the courts increased, particularly with the expansion of federal functions, and as their fiscal management became a larger operation,[8] it became increasingly inappropriate for their administration to be controlled by an agency of the Executive, which was itself by far the largest single litigant. Also it was natural for the courts to wish to develop under their own direction a system for gathering and analyzing statistics concerning their work. The Attorney General from 1933 to 1939, Homer S. Cummings, was disinterested enough to recognize that the administration of the courts should be separate from the Department of Justice, and with his strong support the Administrative Office was created.[9]

The act provides for a Director and an Assistant Director who are appointed by the Supreme Court to serve during the pleasure of the Court and who are subject to removal by it. The other officers and employees are appointed by the Director, subject to the civil service laws and the approval of the Supreme Court. The Director has the general functions previously indicated: first, administering the business affairs of the federal courts (except the Supreme Court), which includes securing the necessary appropriations for their personnel and facilities, and directing the expenditure of the funds appropriated; and second, compiling and reporting statistics and information concerning the work of the courts. In connection with the administration of the courts the Director exercises a general supervision over their administrative officers: that is, the clerks of the courts, United States commissioners, reporters, referees in bankruptcy, and probation officers, subject to their primary accountability to the courts by which they are respectively appointed and which they serve. He also attends to the needs of the courts for quarters. Added to these functions, which are most directly related to the origin of the office, is another, stated in general language in the act, which has become of great importance, viz., to have charge of "such other matters as may be assigned to him by the Supreme Court and the conference of senior circuit judges." Under this provision the Director and his staff have become a kind of executive secretary or agent of the Judicial Con-

[8] The appropriations for the federal courts for the fiscal year from July 1, 1947 to June 30, 1948, although less than 1/19 of 1 per cent of the federal budget for the year, aggregate $19,493,165.

[9] 53 STAT. 1223 (1939), 28 U. S. C. §§444-450 (1940). The act was approved August 7, 1939, and took effect November 6, 1939.

ference of Senior Circuit Judges and its committees, and other bodies like the judicial conferences and councils of the circuits. The Director prepares matters for the consideration of the Judicial Conference of Senior Circuit Judges at its meetings, and between the meetings he endeavors to carry out actions taken by the Conference concerning both the administration of the courts and legislation affecting them. In the latter aspect he cooperates with judges familiar with the particular subjects in representing the Conference before committees of the Congress.

The Administrative Office consists of four divisions under the direction of the Director aided by the Assistant Director: the Division of Business Administration, the Division of Procedural Studies and Statistics, the Probation Division, and the Bankruptcy Division. The Division of Business Administration in turn consists of three sections: the Audit Section, the Service Section, and the Budget and Accounting Section. The divisions have generally the functions indicated by their titles, and each is in charge of a chief (except the Division of Business Administration, which is in charge of the Assistant Director). The Audit Section of that division, under a Chief Auditor, audits the reports of the expenditures and the financial reports of various officers of the federal courts. This audit is subject to the final audit of the General Accounting Office under the Comptroller General. The Service Section, under a Service Officer, attends to the purchase of equipment and supplies for the courts, including law books, typewriters, stationery, court forms, and printing, and arranges for telephone and telegraph service and for quarters. In obtaining quarters, the Director must work through the agencies charged with the construction and operation of federal buildings, because he is not provided with funds to erect or maintain buildings for the courts directly. The Budget and Accounting Section, under a Budget and Accounting Officer, prepares estimates for appropriations and attends to the allocation of the funds appropriated for the various purposes and among the various courts. The Division of Procedural Studies and Statistics is in charge of collecting from the clerks the statistics concerning the work of the courts, and also of procuring by personal visits information necessary to supplement the statistics and permit a rounded judgment upon the operation of the courts. It studies procedural problems referred to it by the committees of the Judicial Conference of Senior Circuit Judges (such as the selection of jurors and the treatment of juvenile offenders), and also procedural problems which may be referred by other agencies concerned with procedure, such as the advisory committees of the Supreme Court, the judicial councils of the circuits, and individual courts. The Divisions of Probation and Bankruptcy supervise the business practices of the probation officers and the referees in bankruptcy. Moreover, the influence of the Administrative Office goes beyond the business routine and is exerted toward sound standards of performance on the part of these officers.

As of the end of the last fiscal year, June 30, 1947, the staff of the Administrative Office numbered 106 persons, divided among the different parts of the office as follows: three (including the Director) in the Office of the Director; seventy-two

in the Division of Business Administration, including the three sections described above; twenty-two in the Division of Procedural Studies and Statistics; four in the Division of Probation; and five in the Division of Bankruptcy. The budget of the Administrative Office for salaries and expenses for the current fiscal year (from July 1, 1947, to June 30, 1948) is $400,000.

In all of his duties the Director acts, in the language of the statute, "under the supervision and direction of the Conference of Senior Circuit Judges." His functions are wholly administrative. He has no authority in matters of legislation or policy except such as may have been approved by the Judicial Conference of Senior Circuit Judges. Although he is appointed and is removable by the Supreme Court, he reports not to the Court but to the Conference. The Chief Justice, as chairman of the Judicial Conference, acts as a connecting link between the Conference and the Court.

SOME PRACTICAL ASPECTS OF THE FEDERAL JUDICIAL ADMINISTRATION

Thus the agencies of the federal judicial administration are: first, and most important, the courts themselves; second, the Judicial Conference of Senior Circuit Judges; third, the judicial conferences and councils of the circuits; and fourth, the Administrative Office of the United States Courts, which performs services for all the others. In most matters two or more of these agencies work together, so that the administration of the federal courts can be treated more intelligently by purposes or functions than by agencies. Four principal functions which will be considered in the remainder of this article are (1) providing personnel and facilities for the courts, (2) promoting promptness in the dispatch of judicial business, (3) promoting efficient procedures, and (4) promoting legislation for the courts.

A. Providing Personnel and Facilities for the Courts

Plainly, suitable administrative personnel is an important factor in the efficiency of the courts. In the federal system the administrative offices, such as that of the clerk of court, are established by statute. But in as much as the appropriations for the salaries of these officers—clerks, probation officers, and others—are made by the Congress in an aggregate sum for the entire country, some method of allocating the appropriations among the courts and among the personnel within the courts is necessary.

Prior to the creation of the Administrative Office the Department of Justice passed upon the number of deputy clerks in each clerk's office and fixed the salaries of the clerks and their deputies within statutory limitations.[10] It likewise fixed the number and salaries of the officers and clerks in the probation offices of the district courts.[11] These functions are now performed by the Administrative Office.

[10] 26 STAT. 826 (1891), as amended, 28 U. S. C. §544 (1940); 40 STAT. 1182 (1919), as amended, 28 U. S. C. §558 (1940); 42 STAT. 500 (1922), 28 U. S. C. §559 (1940); 40 STAT. 1182 (1919), as amended, 28 U. S. C. §562 (1940).

[11] 43 STAT. 1260 (1925), as amended, 18 U. S. C. §726 (1940).

In recent acts providing for court reporters of the district courts,[12] and changing the compensation of referees in bankruptcy from a fee to a salary basis,[13] the Congress has placed the power to fix the number and salaries of these officers in the Judicial Conference of Senior Circuit Judges. By the appropriation acts for the fiscal years 1945, 1946, and 1947, the power to fix the salaries of secretaries and law clerks of judges has been given to the Director of the Administrative Office, to be exercised, however, on the basis of a classification of these employees by the judges served according to proficiency.[14] The Director is authorized to call for a review of any such classification by the judicial council of the circuit as he sees fit.

Judges sometimes chafe at the restrictions upon the number and salaries of the administrative personnel of their courts. They not unnaturally consider that they know better than anybody else what is needed and that they ought to be permitted to provide for what they think best. Some central control is, however, indispensable, in as much as there is a single appropriation for each class of service for the entire country, and it must not be exceeded. Furthermore, it is important that the funds available be allocated as equitably as possible on the basis of need. Although each court has a keen appreciation of its own need, it cannot know the requirements of other courts or how they compare with its own. There is necessity for an over-all allocation of salary appropriations in the interest of all the courts and of the judicial system as a whole. The same is true of appropriations for equipment, such as law books. The Administrative Office, in which this function is placed in reference to most of the appropriations for the courts, regards itself as a trustee bound by one principle: that of fairness and equal treatment according to the conditions in each case. The same is true of the Judicial Conference of Senior Circuit Judges in fixing the salaries of court reporters and referees in bankruptcy.[15]

[12] 58 STAT. 5 (1944), 28 U. S. C. §9a (Supp. 1946).

[13] Bankruptcy Act, §§37, 40, as amended, 60 STAT. 323, 325-326, 11 U. S. C. A. §§65, 68 (Supp. 1946).

[14] The provision of the appropriation acts referred to is as follows:

"*Provided*, That the compensation of secretaries and law clerks of circuit and district judges (exclusive of any additional compensation under the Federal Employees Pay Act of 1945 and any other Acts of similar purport subsequently enacted) shall be fixed by the Director of the Administrative Office without regard to the Classification Act of 1923, as amended, except that the salary of a secretary shall conform with that of the main (CAF-4), senior (CAF-5), or principal (CAF-6) clerical grade, or assistant (CAF-7), or associate (CAF-8) administrative grade, as the appointing judge shall determine, and the salary of a law clerk shall conform with that of the junior (P-1), assistant (P-2), associate (P-3), full (P-4), or senior (P-5) professional grade, as the appointing judge shall determine, subject to review by the judicial council of the circuit if requested by the Director, such determination by the judge otherwise to be final: *Provided further*, That (exclusive of any additional compensation under the Federal Employees Pay Act of 1945 and any other Acts of similar purport subsequently enacted) the aggregate salaries paid to secretaries and law clerks appointed by one judge shall not exceed $6,500 per annum, except in the case of the senior circuit judge of each circuit and senior district judge of each district having five or more district judges, in which case the aggregate salaries shall not exceed $7,500." (Pub. L. No. 166, 80th Cong., 1st Sess. (July 9, 1947).)

[15] The fixing of salaries for the more than 350 individual referees and court reporters, who work under varying conditions, is obviously a somewhat difficult administrative task for a body of twelve persons with limited time. The Judicial Conference of Senior Circuit Judges is aided in the performance of this function by a detailed study and recommendations in advance of its meeting by committees on court reporting and bankruptcy.

To the rule that the administrative officers of the courts are appointed by the courts there is a partial exception, largely upon practical grounds, in the officers who maintain order in the courts. The function of protecting the courts during their sessions devolves in part upon the marshals of the districts,[16] who are appointed by the President and are under the control of the Department of Justice. In addition, the law provides that each district judge may appoint a crier who shall also perform the duties of bailiff and messenger. It also provides for the employment by the marshals, upon a small per diem compensation, of bailiffs who may be needed to supplement the criers in attending upon the court and juries.[17] Other statutes make the power to appoint a crier applicable to each circuit court of appeals.[18]

In the present year the appropriation for salaries of criers is sufficient to provide these officers for only about two-thirds of the district judges. Even so, the Congress has eliminated all but a small part of the appropriation for bailiffs upon the theory that the services of protection of the courts should be rendered as far as possible by the criers. Logically the appropriation for criers should be increased to provide at least one for every part of a district court presided over by a district judge. Even so, there will be a residuum of protection to the courts, which in large trials may be considerable, to be furnished by the marshals. For reasons of economy and other practical considerations, the control of personnel for this purpose will probably have to continue divided between the courts and the marshals.

In general, reliance is placed upon the judges to see that the officers whom they appoint are properly qualified, and this is reasonable enough. If poorly equipped persons are chosen, their incompetence cannot fail to reflect upon the courts and the judges in charge of them. Nevertheless, for two classes of officers, court reporters and probation officers, the Judicial Conference of Senior Circuit Judges has prescribed standards of qualifications. The statute expressly requires that persons appointed as reporters shall meet such standards.[19] The standards were defined by the Judicial Conference in 1944 as follows:

> Persons appointed as court reporters of the United States district courts shall be capable of reporting accurately verbatim by shorthand or mechanical means, proceedings before the court at a rate of 200 words a minute, and furnishing a correct typewritten transcription of their notes with such promptitude as may be requisite. They shall demonstrate familiarity with the terminology used in the courts, and shall be persons of unquestionable probity.

The Conference recommended "that the method of determining these qualifications in each particular case be left to the appointing court which will have a vital interest in securing for the reporting of its proceedings only persons who are competent and upright."[20]

[16] 36 STAT. 1132 (1911), as amended, 28 U. S. C. §220 (1940); REV. STAT. §787 (1875), as amended, 28 U. S. C. §503 (1940).

[17] 58 STAT. 796 (1944), 28 U. S. C. §9 (Supp. 1946).

[18] Judicial Code §127 (1911), 28 U. S. C. §224 (1940); Judicial Code §291 (1911), 28 U. S. C. §547 (1940).

[19] 58 STAT. 5 (1944), 28 U. S. C. §92(a) (Supp. 1946).

[20] REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 13 (Sept. 1944).

The Judicial Conference in 1940 laid down the general principle that "in view of the responsibility and volume of their work, probation officers should be appointed solely on the basis of merit without regard to political considerations; and that training, experience and traits of character appropriate to the specialized work of a probation officer should in every instance be deemed essential qualifications."[21] It was realized at the time that it would be desirable to give to this a sharper cutting edge by defining the qualifications more specifically after the precise standards to be adopted could be further considered. A committee was appointed to study the matter, and upon its recommendation the Judicial Conference in 1942 reaffirmed its previous declaration, supplementing it with a number of elements of qualification, including a college education or the equivalent, and "experience in personnel work for the welfare of others of not less than two years, or two years of specific training for welfare work (a) in a school of social service of recognized standing, or (b) in a professional course of a college or university of recognized standing."[22]

The Judicial Conference, without undertaking to prescribe definite qualifications for United States commissioners (who are the committing magistrates of the federal courts), advised in 1943 that

> The appointment of commissioners should be confined to persons of sound and independent character, of good intelligence and common sense, and of good repute, and that when feasible only those should be appointed who are free from present activity in partisan politics, and that when judges in making an appointment are confronted with a choice between lawyer and layman, each having in combination the foregoing qualifications to substantially the same degree, preference should normally be given to the candidate having the additional advantage of education and experience in law.[23]

Standards like those adopted by the Judicial Conference for the classes of officers mentioned are for application by the courts. In consequence of the discretion given to the courts not all appointees meet the standards. For instance, of twenty-one probation officers appointed in the last fiscal year, thirteen, or 61.9 per cent, fulfilled the qualifications of education and experience. This is not a satisfactory proportion, and efforts are in progress by another committee on probation of the Judicial Conference to increase it. But in general the federal probation officers are a highly intelligent and capable body of men, as will be apparent to anyone who sees them assembled in their regional conferences. Professor Sheldon Glueck, the eminent criminologist of Harvard, wrote of the officers in the northeastern states whom he met at such a conference in Cambridge in 1942:

> One could not help being greatly encouraged in observing the federal probation officers at the Conference. They gave an impression of dignified, mature, clear-headed, and socially minded men.

Opinion in the federal court system is strongly in favor of leaving in the courts

[21] REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 13-14 (Oct. 1940).
[22] REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 9 (1942).
[23] REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 12-13 (1943).

the freedom in the choice of their administrative officers which they now possess. Standards for the guidance of the courts may be set up in some instances, and persuasion toward the appointment of qualified persons may be used. But the decision is for the judges. It is believed that the disadvantage of an occasional inferior appointment is more than offset in the long run by keeping the power where the responsibility resides. Experience seems to show that the persons selected are, by and large, excellently qualified, and more and more emphasis is being placed on merit in appointments. There can be no doubt that this is the collective sentiment of the federal judges.

Procuring suitable quarters for the courts is a task of no little difficulty. The Director has to perform this duty indirectly by making the requisite arrangements with the agencies which are in charge of construction and operation of buildings—the Public Buildings Administration and, in post office buildings, the Post Office Department. This calls for reasonableness on both sides. Courts sometimes are not satisfied with their quarters and are displeased that changes which they want cannot be made, or cannot be made more quickly. There are instances in which courts are having to work under conditions plainly unsuitable, such as crowding and lack of privacy for judges, jurors, and witnesses. Occasionally the conditions are even detrimental to health, as when the lighting systems are inadequate. On the other hand, it is obviously impracticable to permit each government agency, even the courts, to proceed independently in the matter of quarters and build for itself. It is necessary to place the control of buildings in some central agency or agencies, and provide for a coordinated building program. It is only fair to say that the Public Buildings Administration and the Post Office Department, in which the power is now lodged, are on the whole considerate of the courts, and do all that they reasonably can to make the court quarters convenient and attractive. When they fall short the cause is usually a shortage of funds or materials, or priorities for other types of construction.

This suggests the great importance of adequate appropriations for the efficiency of the judicial administration. In the federal system the Director of the Administrative Office develops the budgets for all federal courts except the Supreme Court. The budgets for the three special courts, the Court of Customs and Patent Appeals, the Customs Court, and the Court of Claims, are approved by those courts. The budgets for the circuit courts of appeals and the district courts are approved by the Judicial Conference of Senior Circuit Judges.[24] It is then for the Director of the Administrative Office, with the cooperation of members of the Judicial Conference and other judges especially conversant with the individual services, to explain the estimates to the subcommittees of the appropriations committees of the two houses of the Congress and do his best to justify them. These estimates are subjected to the same sharp scrutiny in the hearings which is given to the estimates for other branches of the government.

[24] 53 STAT. 1223 (1939), 28 U. S. C. §447 (1940).

It has been the policy of the Administrative Office, ever since it was created, to fix the appropriations requested at the amounts sincerely believed to be necessary, and to refuse to add something on the theory that reduction is inevitable, and that if there is a margin in the amounts asked there will be a better chance that what is left will be enough. I believe that this is not merely the only honest course, but that by winning the confidence of the legislative body it will work best in the long run. The appropriations committees are handicapped by having only a comparatively little time to review long and complicated estimates involving hundreds of items of expenditure. Sometimes at the hearings members may utter opinions which seem uninformed or harsh, and an administrator may have difficulty in making his position clear. But the members of the committees are trying to arrive at the essential facts. They have a responsibility for seeing that the funds which come from the people are judiciously used and are necessary, and this is true of the appropriations for the courts. Usually in the end the committees come to conclusions which are fair. The Congress, with here and there a disappointment, has reasonably provided for the financial needs of the federal courts during the period of eight years of which I have knowledge through the conduct of the Administrative Office.

In the last year or two members of the appropriations committee of the House at hearings on the appropriations have informally urged the courts to see whether there were not ways in which economies could be effected without detriment to the service. In this direction a searching study has been inaugurated by a committee of district judges in the Eighth Circuit,[25] which has scrutinized a number of common practices of the district courts, such as the calling of jurors and travel of the court personnel to hold sessions at different places, and commended to the judges means of minimizing the expense involved. Also the Judicial Conference of Senior Circuit Judges at its last annual meeting, in September, 1947, provided for a committee to study economy on a national scale. This study will include consideration of the possibility of making savings through eliminating places of holding terms of court and maintaining branch offices of the clerks of court where the volume of business is slight, and of other means of economy. The federal courts are resolved to cooperate with the Congress in all reasonable efforts to this end.

B. Promoting Promptness in the Dispatch of the Judicial Business

It has been stated that one of the reasons for creating the Administrative Office was to establish for the courts a thorough and comprehensive system of statistics. The Administrative Office endeavors to provide this through statistics based upon individual reports by the clerks on cases filed and terminated, and through information gained on visits to the courts and observations made in the field by attorneys on the staff of the office. This service is in charge of the Division of Procedural Studies and Statistics. The system of statistics is explained by Mr. Will Shafroth, Chief of the Division, in another article in this symposium.

[25] The Eighth Circuit comprises the states of Arkansas, Missouri, Iowa, Minnesota, North Dakota, South Dakota, and Nebraska.

The necessity for supplemental information gained by personal observation of attorneys in the field can readily be appreciated. Statistics tell something, but by no means all. They need to be interpreted. The causes of conditions reflected by the figures can usually be ascertained only by personal inquiry, from informed sources within and without the courts. Consequently it is the policy of the Administrative Office always to check conclusions from statistics in this way. The results are reported annually to the Judicial Conference of Senior Circuit Judges and copies are filed with the Congress as required by law. The trends of judicial business are also reported quarterly to the judicial councils of the circuits.

It should be emphasized that in this function the Administrative Office is only a fact-finding agency. The responsibility for determining what steps shall be taken to remedy any congestion or slowness which may appear is that of the bodies for whom the reports are primarily intended—the judicial councils of the circuits and the Judicial Conference of Senior Circuit Judges. It can be said that these bodies are not slow to act upon the information supplied. Among the means open to them are those explained above: to procure the temporary assignment of outside judges to courts in difficulty, and to enable judges who are in arrears in deciding cases under advisement to dispose of them, by bringing in other judges to handle their current work temporarily.

In September, 1946, the Judicial Conference of Senior Circuit Judges, following a study by a committee, adopted a procedure which the Administrative Office was directed to follow for making larger use of the provision for assignment of judges between circuits.[26] This helps to meet temporary emergencies. Where congestion is persistent it ordinarily means only one thing: that there is need for more permanent judges in the district or circuit. The Judicial Conference of Senior Circuit Judges then recommends legislation for an increase in the number of judges, and the responsibility for providing the necessary judicial force passes to the Congress.

C. Promoting Efficient Procedures

As has been shown, the Judicial Conference of Senior Circuit Judges has some legal powers in the administration of the courts, such as the power to approve the annual estimates for appropriations and the power to fix the number and compensation of court reporters and referees in bankruptcy. But the influence of the Judicial Conference, through its advice and recommendations, may well be greater and more far-reaching than its legal powers. I give two examples. In 1946 the Conference recommended a manual embodying principles of design for court quarters, prepared by the Public Buildings Administration and approved after modifications by a committee of the Conference. This is intended to embody in court quarters, when construction is resumed by the federal government after the stoppage due to the war, features which have been shown by experience to be most effective and to avoid the waste of unnecessary and ill-advised variations in the design of particular buildings.

[26] REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 23 (1946).

At the same time, the Conference was careful to make a reservation that the general principles of design were to be subject to any changes that might be necessary to meet local conditions.[27]

A practice which has proved conducive to the expeditious determination of cases in both federal and state courts is the pretrial conference. This is, in essence, a survey of the issues in the case by the judge in advance of the trial, in the presence of counsel and sometimes of the parties, for the purpose of reducing to a minimum the matters in controversy and shortening the time consumed in trial by litigants, witnesses, jurors, and counsel. Incidentally, it conduces to settlement in a substantial proportion of cases, although this is not the primary objective. The Judicial Conference of Senior Circuit Judges recommended this procedure to the district courts in 1938[28] and 1944,[29] and has created a standing committee of judges to further the use of it. This strong endorsement is unquestionably one of the major reasons for the widespread use of pretrial procedure in the federal courts.

The Administrative Office naturally has nothing like the prestige of the judges, individually or collectively, to support its advice. In its supervision, however, of the work of the administrative officers of the courts—the clerks, the probation officers, the referees in bankruptcy, and others—it has opportunities to suggest improvements in practice, and these in general are accepted in a friendly spirit and frequently followed. An effort is made by the Office to adopt in these matters an attitude which is not censorious, but understanding and sympathetic. In that spirit much can be accomplished without power. A court administrator must speak softly and carry virtually no stick at all. Also, he must make it plain that any advice that he offers which is not based upon clear legal mandate is for the consideration and subject to the approval of the judge or judges of the court concerned. Perhaps it is as well that he can rely for the adoption of any suggestions which he may make only upon their merit. If the judges, through their contacts with him over a period of time, gain confidence in the administrative officer and come to believe that his purpose is to help and not to hinder, they will give him their cooperation, and, far beyond his legal authority, he can be helpful in improving the administrative practices of the courts.

D. Promoting Legislation for the Courts

Many improvements in the judicial administration require changes in the statutes, and it is natural that the Judicial Conference of Senior Circuit Judges should become

[27] *Id.* at 24-25.

[28] The Judicial Conference of Senior Circuit Judges at its annual meeting in 1938 referred to Rule 16 of the Federal Rules of Civil Procedure providing for pretrial conferences, and made the following comment on it:

"Although this rule has been in effect for a very short time it has already been applied in at least one district with apparent success. If the District Judges avail themselves of this opportunity, and proceeed in the manner contemplated, there is every reason to believe that the speedy and appropriate disposition of cases will be greatly facilitated. The real points at issue may be ascertained at an early stage of the litigation and arrangements be made to avoid all delays for unsubstantial reasons." REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 4 (1938).

[29] REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 20-21 (Sept. 1944).

a medium for expression of the collective opinion of the federal judiciary in regard to legislation affecting the federal courts. It is the general policy of the Conference to refrain from passing judgment on measures pertaining to substantive law or involving issues of policy, which are primarily matters for the Congress, and to confine itself to measures relating to procedure, for which it has a definite responsibility. In such matters, and particularly those relating to the district courts, it has evolved a procedure for giving the circuit and district judges an opportunity to express their views. Before any measure affecting the district courts is recommended it is considered by a committee of the Judicial Conference appointed by the Chief Justice, of which at least half the members are district judges. The report of the committee is circulated among all the circuit and district judges and is submitted for consideration at the judicial conferences in the circuits. It is contemplated that each circuit will have the advice of a legislative committee of the circuit on the proposal. Any actions taken at the circuit conferences are reported through the senior circuit judges to the Judicial Conference of Senior Circuit Judges.[30] Only at the end of this process does the latter body make recommendations to the Congress in reference to the measures under consideration.

In recent years a number of major improvements in the organization of the federal courts have been accomplished by legislation. In 1944 a law was passed providing for official court reporters in the district courts, and giving to the federal courts a reporting system on a par with the best systems in the states.[31] In 1946 the laws relating to United States commissioners were revised so as to simplify and make more adequate their basis of compensation by fees, and to facilitate prompt payment,[32] as well as to furnish them with their official forms at government expense[33] —something that should have been done long before. In the same year there was enacted one of the most notable reforms in the federal courts in recent times: the law changing the compensation of referees in bankruptcy from a fee to a salary basis.[34]

The course of the measure concerning referees illustrates the long effort and the cooperation of many interests that are usually necessary to bring about major changes in the law. A number of times in the past the fee basis of compensating referees had been criticized and salaries had been proposed instead. But the movement for the recent enactment began in 1940 with an intensive study of the referee system by a committee on bankruptcy administration appointed by the Attorney General.[35] Its

[30] REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 9-10 (1945).

[31] 58 STAT. 5 (1944), 28 U. S. C. §9a (Supp. 1946).

[32] 60 STAT. 752-753, 526, 28 U. S. C. A. §§597-597c, 599 (Supp. 1946).

[33] 60 STAT. 525, 28 U. S. C. A. §528a (Supp. 1946).

[34] 60 STAT. 323-332, 11 U. S. C. A. §§1, 62, 63, 65, 67, 68, 71, 79, 80, 81, 102, 104, 112, 517, 1024, 1033, 1059 (Supp. 1946).

[35] The committee at the time of issuance of the report consisted of Assistant Attorney General Francis M. Shea, chairman, Jesse H. Jones, then Secretary of Commerce and Federal Loan Administrator, Jerome N. Frank, then chairman of the Securities and Exchange Commission and now United States Circuit Judge for the Second Circuit, William J. Campbell, United States District Judge for the Northern District of Illinois, Robert P. Patterson, then United States Circuit Judge for the Second Circuit and later

report, a notable public document issued early in 1941, recommended reducing the number of referees, making them as far as possible full-time officers, and paying them by salary.[36] The Judicial Conference of Senior Circuit Judges at a special meeting in the winter of 1941 approved the plan with modifications.[37] Thereafter the Judicial Conference and the Department of Justice under successive attorneys general worked together year by year to further the legislation. Public-spirited support was given by many organizations outside the Government which were concerned with bankruptcy, including the National Bankruptcy Conference, the American and other bar associations, credit and commercial associations, and others. Amendments had to be accepted to overcome objections, and were made up to the last stages of consideration in the Congress. At last the measure was passed, and on June 28, 1946, it was approved.

Even then, before the new statute could be put into operation it was necessary under its terms for the Judicial Conference of Senior Circuit Judges to adopt a detailed plan. Also it was necessary for the Congress to make appropriations to start it, although the law provided that in the long run the cost of the bankruptcy administration should be met as before by the charges paid by the parties to bankruptcy proceedings. In the months following the enactment of the statute, the Administrative Office through its Bankruptcy Division developed a plan for the number, salaries, and headquarters of referees, full-time and part-time, in each judicial district. This was submitted to all the circuit and district judges in March, 1947, was considered by the judicial councils of the circuits (which made some suggestions for change), was further considered by the Bankruptcy Committee of the Judicial Conference of Senior Circuit Judges, and finally was approved by the Judicial Conference itself, with modifications which were relatively inconsiderable, at a special meeting in April, 1947.[38] For a while it was doubtful whether the Appropriations Committee of the House of Representatives would recommend the necessary appropriations. But it did; the appropriations were made for the fiscal year beginning July 1, 1947, and the law went into operation on that date.

THE INFLUENCE ON THE STATES OF TENDENCIES IN THE FEDERAL JUDICIAL ADMINISTRATION

There is no close analogy as yet in state court systems to the judicial conferences and councils and the Administrative Office in the federal system. But some of the elements are present in embryo.

Secretary of War, Edward H. Foley of the Treasury Department, Thomas F. McAllister, then Associate Justice of the Supreme Court of Michigan and now United States Circuit Judge for the Sixth Circuit, and Lloyd K. Garrison, then Dean of the University of Wisconsin Law School and later a member of the National War Labor Board.

[36] ADMINISTRATION OF THE BANKRUPTCY ACT, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON BANKRUPTCY ADMINISTRATION xi-xvi (1940).

[37] REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 1-7 (Jan. 1941).

[38] REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES 2-43 (April 1947).

Many states have judicial councils, the purpose of which, like that of the federal conferences and councils, is to improve the administration of the courts within their respective jurisdictions.[39] Like the judicial conferences of the circuits in the federal system and unlike the Judicial Conference of Senior Circuit Judges and the judicial councils of the circuits in that system, the judicial councils in the states are usually composed of representatives of the bar as well as of judges, and the judges are chosen to some extent upon an individual basis and not exclusively ex officio. In the states there is a current tendency, which is favored on good grounds, to include interested laymen in the judicial councils. Also, the functions of the judicial councils in the states are as a rule only consultative and advisory; such councils have no administrative powers such as those of the Judicial Conference of Senior Circuit Judges and the judicial councils in the circuits in the federal system. In some instances the judicial councils in the states compile and report statistics of the courts. They are helpful in maintaining a continuing scrutiny of the work of the courts in their states and in promoting improvements in methods. But generally they are handicapped by the lack of staff assistance, and, partly in consequence, they tend to be intermittent and uneven in their operation.

In only a few states are there officers bearing any resemblance to the Administrative Office of the United States Courts, and in them the parallel does not go far. Connecticut has an executive secretary of the judicial department who audits the expenses of the courts under the direction of the judges, prepares the court budgets, acts as purchasing agent, and prepares the payrolls.[40] Missouri provides that the reporter of the Supreme Court shall serve as executive secretary of the Executive Council, which in turn is the governing body of its Judicial Conference.[41] In this capacity he obtains and reports information concerning the state of the business of the courts. In 1945 West Virginia enacted legislation providing for an administrative office of the Supreme Court of Appeals with a director as its head. The functions of this office are substantially similar to those of its federal counterpart, and the enabling act provides that the director is also to act as executive secretary of the Judicial Council. An appointee has been named under this act and has assumed his duties for the Judicial Council, but the administrative office has not yet been established.[42]

The new constitution of New Jersey which will take effect September 15, next, goes the whole distance to provide for a unified administration of the courts of that state, by placing power and responsibility in the Chief Justice, assisted by an Administrative Director. The first paragraph of Section VII of Article VI (the Judicial Article) provides that:

[39] There is no recent directory of judicial councils in the states. Such bodies existed in something like twenty-eight states in 1942, according to information contained in the HANDBOOK OF THE NATIONAL CONFERENCE OF JUDICIAL COUNCILS for that year.

[40] Connecticut Public Acts of 1937, c. 183, as amended, CONN. GEN. STATS. §788*f*. (Supp. 1941).

[41] Missouri Laws 516-517 (1943).

[42] House Bill 308 of the Legislature of West Virginia, enacted March 10, 1945, 4th report, Judicial Council of West Virginia 23-24 and App. 1, 31-55 (May 1, 1946).

The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the State. He shall appoint an Administrative Director to serve at his pleasure.

The second paragraph provides for assignment of judges of the Superior Court by the Chief Justice among the various parts and for assignments to the Appellate Division according to rules of the Supreme Court. All who know the first Chief Justice under the new constitution, the Honorable Arthur T. Vanderbilt, will be confident that he will develop an effective administrative system.

The judicial councils in states which are not willing or not yet ready to go as far as New Jersey would plainly be strengthened by having an officer in the nature of an executive secretary who could serve them continuously, somewhat as the Director of the Administrative Office of the United States Courts serves the Judicial Conference of Senior Circuit Judges. This may be the natural approach toward an administrative office in state court systems. It seems probable that there would be little resistance to providing a state judicial council with a secretary at a reasonable salary and furnishing him with an office and moderate clerical service. Then if sentiment grew for assigning to him administrative and business duties, such a development might gradually come. Many of the services performed by the Director of the Administrative Office of the United States Courts would be equally helpful in other states if they were accepted. But the development of such an office cannot be forced; if it comes, it will have to come from an effective public opinion within the states.

FEDERAL JUDICIAL STATISTICS

WILL SHAFROTH*

The word "statistics" has an unfortunate connotation in the popular mind. For most people it means long columns of meaningless figures, which can be interpreted to support any particular thesis which is being advocated. Nevertheless, the activities of all business are based on statistics, and much of our national policy is determined by them. Our tax program, our budget, our national defense, all are founded upon statistics, and the Marshall Plan, which is now the major plank in our foreign policy platform, depends upon how much assistance the nations of western Europe need and how much we can afford to furnish, both of which can be determined only from a statistical base.

THE PURPOSE OF JUDICIAL STATISTICS

Court statistics have a similarly valid purpose but on the whole have been a neglected branch of the art. It is fair to ask, "Why do we want judicial statistics?" The short, simple answer is that they are useful in improving the administration of justice, both in an individual court and in a court system. The purpose of the statistical work of the Administrative Office of the United States Courts, which collects the federal judicial statistics, is well set forth in the 1945 report of the Judicial Statistics Committee of the Judicial Conference of Senior Circuit Judges in the following words:

> While the law's delays are a dramatic setting in which to view the need of information as to the ordinary day-to-day activities of a court, it is obvious that they are but a part of the information necessary to know how the extensive federal judicial business is being carried on and how the courts' functioning may be bettered. Indeed, one of the most practical uses of the statistical reports quite naturally is to be found in the information thus made available as to the nature and amount of business from district to district and the adequacy of the personnel to care for it. . . . Such information is used by Congress in passing upon legislation for additional judges, by various circuit councils in seeing that business is properly expedited, by the Director of the Administrative Office in making suggestions to the Chief Justice and to senior circuit judges for the assignment of both circuit and district judges under the new flexible statutory provisions to circuits and districts where need is acute, and by these judicial officers in making those assignments which are proving so effective for the rapid and orderly dispatch of judicial business in congested areas.

It has been often pointed out that just as no great business expects to function without

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careful statistical reports and audits of its activities, so the vast judicial establishment needs like reports for an understanding of what is being done and where efficiency may be promoted. This general purpose is the most immediate and prime function of judicial statistics.[1]

An illustration of the application of statistics in measuring the effect of procedural changes is found in the District of Columbia, where, following the adoption of the new Federal Rules of Civil Procedure, a system of pre-trial conferences was inaugurated in civil cases in the United States district court. The question whether the new system was expediting the disposition of cases was answered by the figures on the number of dispositions and on the reduction in time between the date cases went on the calendar and the date they were tried.

During the fiscal year 1940, with only one more judge operating during the entire year than in 1939 and a second additional judge sitting for about a month, 2,237 civil cases were disposed of in comparison with 1,074 the year before. The interval that elapsed from the time when a jury case went on the calendar until it reached trial was reduced from twenty-three months in October, 1939, to fifteen months in June, 1940, and, during the same period, the time for reaching non-jury cases was shortened from twenty-two months to eight months. With the inauguration of pre-trial, cases disposed of by praecipe and by consent verdicts and judgments increased from 755 in the fiscal year 1939 to 1,288 in 1940. Most of these dispositions represented compromise settlements. During the fiscal year 1940, 317 cases were settled at pre-trial and 253 between pre-trial and final trial. These statistics furnished a most powerful argument for the effectiveness of pre-trial procedure.

The use of court statistics by Congress has already been referred to. An illustration of such use is found in the report of the Senate Judiciary Committee on a bill[2] to authorize the appointment of an additional judge for the district of Delaware. In recommending the bill the committee quoted the report furnished to it by the Administrative Office, a part of which was as follows:

> For some time it has been apparent that the load is too heavy for one judge. Although the number of cases brought before him does not appear to be unusually large and in fact is somewhat below the average per judge throughout the country, the suits filed in the district of Delaware contain a relatively high proportion of cases that demand a large amount of the judge's time; such, for instance, as patent suits, stockholders' derivative actions, and suits in relation to the dissolution of holding companies under the Public Utility Holding Company Act of 1935.
>
> As an example, there were on the docket on June 30, 1945, 22 patent cases, which were approximately one twenty-second of all such cases pending in the 84 district courts of the United States, exclusive of the District of Columbia. Compared with this number of patent suits of 22 for the judge in the district of Delaware, the number per judge in other districts with a high proportion of such suits was 8.3 for the southern district of Ohio, 7.8 for the southern district of New York, and 6.5 for the northern district of

[1] *Report of Committee on Judicial Statistics*, 7 FED. B. JOUR. 292, 294 (1946).

[2] REP. No. 1037 to accompany S. 1801, 79th Cong., 2d Sess. (1946), by Mr. McCarran for the Committee on the Judiciary, United States Senate.

Illinois, and from there down. Of 56 stockholders' derivative actions which were pending in the 84 districts of the United States as of June 30, 1945, 11, or approximately 19 percent, were in the district of Delaware. In the only other district in which there was any considerable number of actions of this type, the southern district of New York, the number was only 14, or slightly over one case per judge for the 12 judges, as compared with 11 for the one judge for Delaware. On December 31, 1945, 17 suits brought by the Securities and Exchange Commission in relation to plans for dissolution of holding companies under the Public Utility Holding Company Act of 1935 were pending in the district of Delaware and affected the companies, many of them well known, listed on page 4 of Mr. Shafroth's memorandum enclosed.

Another factor indicative of the considerable proportion of difficult cases brought in the district is the comparatively high number of appeals, an average for the last 5 years of 20 per year for the district judge in Delaware, in comparison with an average number per judge in all of the districts of 11.3. Other pertinent data are shown in Mr. Shafroth's memorandum.

It is plain from observation of the work of the court during the last years that two judges are needed.

This statement was accompanied by a more extensive analysis of the business of the district and tables showing the flow of cases for a period of six and one-half years, the caseload per judge in the district as compared with that in the Third Circuit and in the eighty-four districts for a period of six years, the number of civil cases filed in the district by nature of suit for a similar period, and some detailed information with reference to patent cases and bankruptcy cases filed in the district.

A further important use of judicial statistics which needs to be stressed is the part which they can play in furnishing information to students of the social sciences. No study of the operation of rationing and price control is complete without a knowledge of the court actions, both civil and criminal, brought to enforce the regulations and to punish violations. Was the May Act of July 11, 1941,[3] prohibiting prostitution in areas adjacent to army camps, as effective as it was hoped it would be? The answer must include some information on the extent and results of court actions to enforce it. The number of prosecutions under the Selective Service Act was far less than under the Draft Act of World War I. Was this due to more vigorous prosecutions and a more speedy operation of the courts or was it due to the manner in which the two laws were drafted and the policy of the enforcement officials? Answers to these questions require, among other things, a close study of the cases involving the statutes which were brought in the federal courts. It is an interesting fact that over a given period the percentage of convictions of defendants tried by jury for three types of offenses varied from 95 per cent for defendants in Selective Service Act cases to 54 per cent in OPA cases and 49 per cent for defendants charged with violating the May Act.

With the current talk of the possibility of reinstating rationing and price controls, it is of interest to know that of 75,000 civil cases brought in the federal courts in the fiscal years 1945, 1946, and 1947 by the Office of Price Administration or its

[3] 55 STAT. 583 (1941), as amended, 18 U. S. C. A. §518a (Supp. 1946).

successors for injunctions or treble damages, only three per cent of those disposed of during those years have been tried, the vast majority being dismissed or terminated by judgments entered by the consent of the parties. During the same period 8,800 criminal proceedings were brought. It seems obvious from these figures that civil actions rather than criminal prosecutions were generally used against at least the smaller violators and that in filing such civil actions the enforcement agency was aware that the bulk of them would never be tried.

To the end that the federal court data which has been accumulated shall be of as great use as possible, the Administrative Office of the United States Courts and the Judicial Statistics Committee have offered to make information available to scholars and students on such subjects as: the use in criminal law enforcement of the charge of criminal conspiracy or of mail fraud; the extent of the choice of venue in Federal Employers' Liability Act cases; the results of the new Federal Rules of Criminal Procedure providing for waiver of indictment (Rule 7(b)) and transfer for plea and sentence (Rule 20); the use of the statutory three-judge court; the diversity jurisdiction of the federal courts and the use of the removal statute;[4] the extent of recidivism among probationers of the federal system; pre-trial procedure as a means of promoting a more efficient disposition of judicial business; the use of discovery and summary judgment proceedings in the federal courts;[5] the operation of the Selective Service Act during the war;[6] and the number of denaturalization cases brought in the federal courts.

An example of the help which has been furnished along such lines is the data supplied by the Administrative Office to the Department of Political Science of the University of Minnesota concerning the judicial business of the United States District Court for the District of Minnesota in connection with the study which is being made concerning federal and state relationships in that state.

Another purpose of mass statistics is given by Mr. Sam Bass Warner, now Register of Copyrights and formerly a professor of law at Harvard:

> The function of mass statistics is . . . to focus attention on matters needing investigation and explanation.
>
> . . .
>
> The value of criminal statistics in society's struggle with crime may be compared with that of the balance sheet and profit and loss statement in a corporation's struggles for profits. Neither the balance sheet nor the profit and loss statement show why the business has been successful, yet no corporation would think of operating without them. The balance sheet and the profit and loss statement are for the corporation the indispensable tools of knowledge. Similarly, mass criminal statistics are the indispensable tools of knowledge

[4] An interesting study of this subject is Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A. B. A. J. 499 (1933).

[5] An excellent unpublished study on this subject of cases in the Southern District of New York was made by Mr. Abram Stockman for the New York Law Society in 1942.

[6] A study of Selective Service cases was made by Mr. Ronald H. Beattie while Statistician of the Administrative Office and published in the quarterly report of the Director for the second quarter of the fiscal year 1945.

for any community that is attempting to reduce its crime and improve its administration of criminal justice.[7]

This caveat against too great reliance on criminal statistics to point the way to the correction of defects should also be applied to civil judicial statistics. In the words of the late Chief Justice Harlan F. Stone:

> The statistical method of dealing with social problems often cannot be relied on as mathematical demonstration leading to specific conclusions, but it may be used to indicate tendencies, to mark out the boundaries of a problem and to point out the direction which should be given to a particular investigation of a non-statistical character.[8]

To attain as far as possible the objectives of judicial statistics which have been mentioned, a system for the collection of data from the federal courts has been set up by the Department of Justice and elaborated by the Administrative Office to such a point that it may now be stated that federal judicial statistics are more comprehensive than those compiled by any other country, and more complete than those of any state, including New York and California, where excellent statistical work is done by the judicial councils.[9] It is true that the criminal statistics issued by Germany before the first World War, and by France, Italy, and England, and perhaps some other European countries, up to the time of the second World War were more comprehensive than our federal statistics in the detail with which they reported the amount and nature of criminality and the characteristics of convicted offenders. Such reports were very useful from a sociological viewpoint. Statistics of this kind are issued periodically by the Federal Bureau of Investigation and the Bureau of Prisons of the Department of Justice. But from the standpoint of court administration, more complete information as to federal judicial statistics is available in the Administrative Office as to both civil and criminal cases than can be found for the courts of any other nation or state. The reason for this is the use of the individual case card system, which is more fully explained below.

HISTORICAL REVIEW OF FEDERAL JUDICIAL STATISTICS

The first comprehensive data on the business of the federal courts is found in the report of the Attorney General for the fiscal year 1872.[10] This contains reports of criminal cases and of civil suits to which the United States was a party classified into five divisions, viz., customs, internal revenue, post office, quo warranto, and miscellaneous. Beginning with 1873 data on other federal civil business is also given. By 1922 the number of classifications used in the tables published in the Attorney

[7] SAM BASS WARNER, CRIME AND CRIMINAL STATISTICS IN BOSTON 54-55 (1934).

[8] Book Review, 35 HARV. L. REV. 967, 968 (1922).

[9] See also bibliography of judicial statistics compiled by the author, 38 LAW LIBRARY JOUR. 37 (1945).

[10] The Act of June 22, 1870, which established the Department of Justice, required the Attorney General to make an annual report "of the business of the Department of Justice . . . and of any other matters appertaining thereto that he may deem proper, including a statement of the . . . statistics of crime under the laws of the United States, . . ." and as far as practicable, under the laws of the several states. REV. STAT. §384 (1875), 5 U. S. C. §333 (1940). Some information was included in the annual report for 1870.

General's report had increased to about fifty for civil cases and an equal number for criminal cases. However, the major change in federal judicial statistics did not occur until 1935, when a system of individual card reporting for each civil and criminal case was adopted on the recommendation of a committee appointed by the National Commission of Law Observance and Enforcement (popularly known as the Wickersham Commission). The committee's chairman was Judge Charles E. Clark, now of the United States Circuit Court of Appeals for the Second Circuit, and at that time dean of the Yale Law School. This system gave the flexibility which was needed for a study of particular aspects of the business of the federal courts. When the Administrative Office of the United States Courts was organized in 1939 the Department of Justice's system was taken over. Through the setting up in the Administrative Office of a Division of Procedural Studies and Statistics, the opportunity has been afforded for a detailed study of the work of particular courts and districts and for an annual review of the total business of the federal courts.

At the time of the transfer, only the collection of civil and bankruptcy statistics was taken over by the Administrative Office. Reports on the criminal business of the courts were being made by the United States attorneys to the Department of Justice, and criminal statistics furnished by the Department were published by the Administrative Office in its annual reports for 1940 and 1941. Beginning July 1, 1941, the clerks of court were instructed also to furnish information to the Administrative Office on criminal cases, and since that date all district court statistics have been under the control of the judicial branch of the government. The Department continues to receive reports from the United States attorneys, but these differ in some respects from the information on criminal cases supplied to the Administrative Office. A major difference between the two sets of statistics has been that the Administrative Office from the beginning has tried to eliminate from its figures the duplicate counting of defendants who appeared in more than one charge at the same time or whose cases were disposed of during the same period, while the Department has not eliminated such duplication.

Individual case cards for cases in the circuit courts of appeals were initiated at the same time the criminal statistics were taken over. Since the transfer of the federal probation system from the Department of Justice to the Administrative Office, statistics in reference to probationers and some data with reference to parolees and conditional releasees have been furnished to that office by probation units in the field and have been included in its annual report.

Primary responsibility for establishment of the Administrative Office's statistical system is to be credited to Ronald H. Beattie, an extremely able statistician, who served the office from 1940 to 1944.[11] While the general system was taken over from the Department of Justice, Mr. Beattie adapted it to the task of furnishing more complete information concerning the work of the courts, trained the office

[11] Mr. Beattie is now Statistical Consultant of the Department of Corrections of the State of California.

statistical staff, and did some noteworthy research on his own initiative. He was succeeded as statistician by Mr. Orin S. Thiel, who has continued to develop the possibilities which are inherent in the complete collection of statistical data furnished by the clerks of court.

THE STATISTICAL DIVISION OF THE ADMINISTRATIVE OFFICE

One of the prime purposes in creating the Administrative Office was to speed up the operation of the federal courts through the furnishing of accurate information on the state of business in each individual court and in each class of courts. The legislative history of the bill shows that this was thoroughly discussed in the hearings both in the Senate and in the House and was referred to in the committee reports.[12] In an address before the American Law Institute on April 6, 1941, former Chief Justice Charles E. Hughes, after stating that the chief objective of the legislation was "to promote promptness and efficiency in the disposition of litigation," said: "One of the necessary steps to this end is to obtain an adequate understanding of the course of administration by perfecting a system of statistics so that they will be really informative and not a mere mass of figures, which through lack of proper analysis are either meaningless or of slight value."[13] When the office was set up a statistical staff was provided, and two attorneys in addition to the Chief were allocated to the division for the purpose of inspection of the dockets of the several courts. Another provision of the Act creating the office gave the Director the duty of examining the state of the dockets and of making quarterly reports to the Senior Circuit Judges of each circuit, "to the end that proper action may be taken with respect thereto."[14] From a statistical point of view, another important provision of the Act directed the clerks of the district courts to comply with any and all requests made by the Director for information and statistical data.[15]

The statistical methods used in the Administrative Office are of some interest and importance. The clerk of each district and circuit court in the federal system

[12] The report of the House Judiciary Committee contained the following statement: "The design of the legislation is to furnish to the Federal courts the administrative machinery for self-improvement, through which those courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice. To that end, the Director is required to prepare and submit quarterly, to the senior circuit judge of each circuit, statistical data and reports of the business transacted by the district courts therein, and a semiannual council of the circuit judges in each circuit is provided for the purpose of studying such reports and expediting the work of the district courts, as well as the circuit courts of appeals. The district judges are required to carry out the directions of the council as to the administration of the business in their respective courts. In addition to the council, the bill provides for an annual conference of the circuit and district judges in each judicial circuit, with participation by members of the bar for the purpose of considering the state of the business of the courts and advising ways and means of improving the administration of justice within each circuit." REP. No. 702 to accompany H. R. 5999, 76th Cong., 1st Sess. 2 (1939).

[13] 27 A. B. A. J. 334 (1941).

[14] The Director is charged with "examining the state of the dockets of the various courts and securing information as to their needs for assistance, if any, and the preparation of statistical data and reports of the business transacted by the courts, and promptly transmitting the information so obtained quarterly to the senior circuit judges of the respective circuits, to the end that proper action may be taken with respect thereto. . . ." 53 STAT. 1223 (1939), 28 U. S. C. §446 (2) (1940).

[15] 53 STAT. 1223 (1939), 28 U. S. C. §446 (7) (1940).

makes a report on a separate card as to each case filed in the court and as to each case terminated. Bankruptcy termination reports are prepared in the referee's office on a form sheet, filed with the clerk and forwarded by him to the Administrative Office. All these case reports are sent in once a month by each clerk with a summary form showing the number of cases filed and terminated during the month, and the number of cases pending at the end of the month. Cards for the cases filed show the district, the docket number, and the nature of the case or the type of offense, and also the name of the case. The termination report shows the procedural progress of the case in court, whether there was a trial or not, how long the trial lasted, by what judge the case was tried, and the outcome, which means the amount of recovery in a civil case, or the type and length of sentence in a criminal case.[16] In bankruptcy the distribution to creditors is given with an analysis of the expenses of administration. The information on these cards is classified by the Administrative Office staff by a numerical code, and the numbers for each item are then punched on the card which has been sent in, a light cardboard card measuring 3¼ by 7⅜ inches, suitable for processing through a mechanical sorting and counting machine of the Hollerith type. During the fiscal year 1947 approximately 225,000 separate case reports were received from the clerks. Obviously it would be impossible to tabulate these by hand. The Hollerith statistical system had been employed in the study of cases conducted by the Yale Law School in the Connecticut Superior Courts, by Johns Hopkins Institute of Law in its study of state court statistics in Maryland, Ohio, and West Virginia, and by the committee of the Wickersham Commission which conducted the study of the business of the federal courts. Therefore, when the Department of Justice adopted the individual card reporting system, the adaptability of the punch card system to judicial statistics had been sufficiently demonstrated. It was immediately used in connection with the individual card reporting. In addition to machines for punching the cards and the Hollerith sorter and counter, the Administrative Office has also added other International Business Machines equipment, including a tabulator which lists the figures on punch cards and adds them at the same time, a summary punch which, when attached to the tabulator, makes a new punch card giving combined figures which have been added on the tabulator, a collator, which automatically matches filed and terminated cards of the same docket number, and a gang punch which simultaneously punches a number of cards. These are all time-savers which have enabled the office to produce more accurate figures more promptly. There are various uses to which these figures have been put, several of which have already been mentioned. By a quarterly report, the senior circuit judges and the members of each circuit court, constituting the judicial council of the circuit, are given information as to the condition of the district courts in the circuit, to assist them in fulfilling the supervisory functions placed upon them by the Administrative Office Act.[17]

[16] The cards used for reporting civil and criminal cases are reproduced in Figs. 1-4, showing the information requested.

[17] Section 306 of the Act provides: "The senior judge shall submit to the Council the quarterly

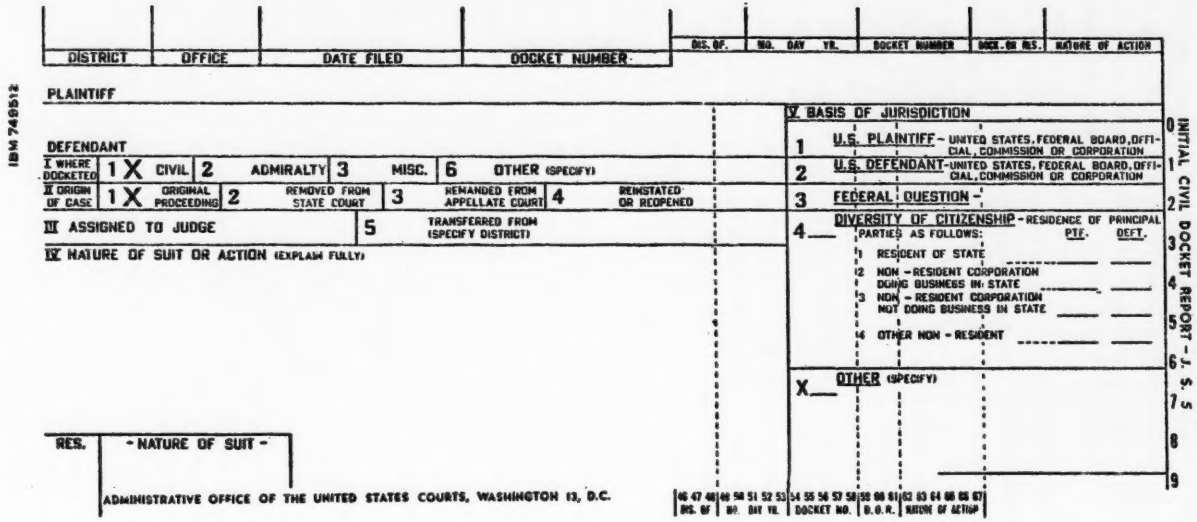

FIG. 1—INITIAL CIVIL DOCKET REPORT

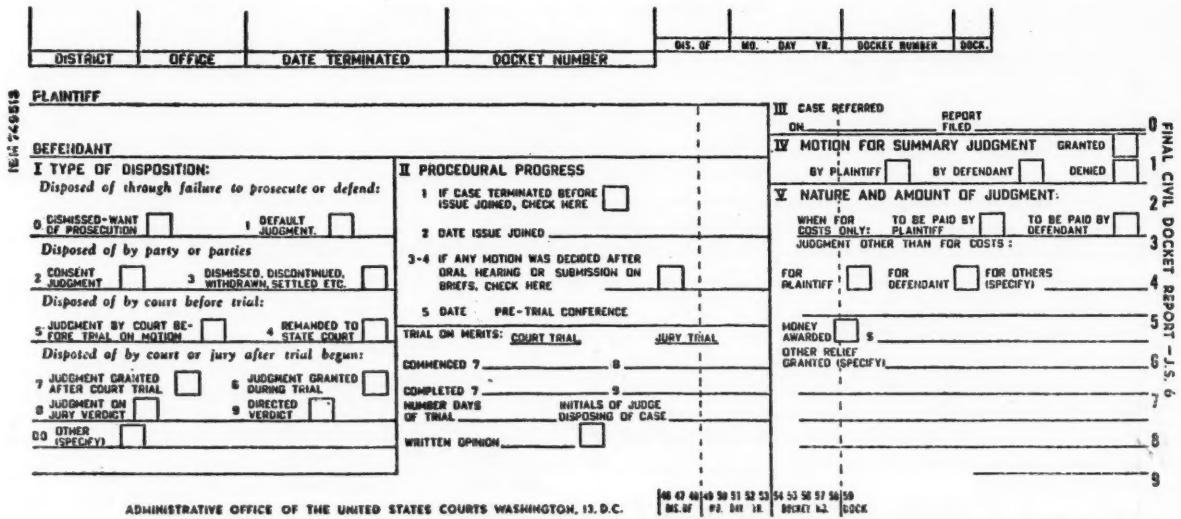

FIG. 2—FINAL CIVIL DOCKET REPORT

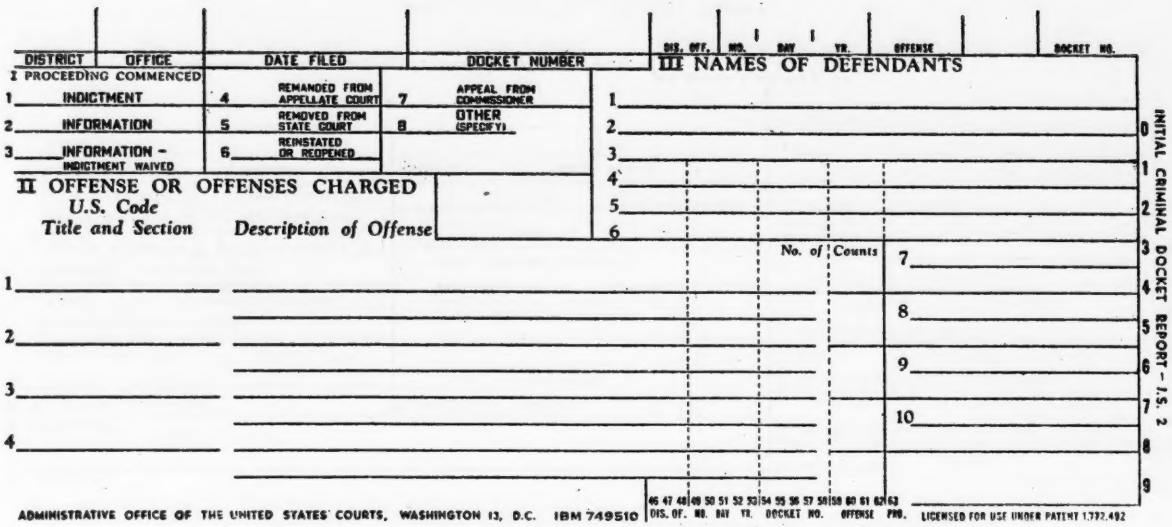

FIG. 3—INITIAL CRIMINAL DOCKET REPORT

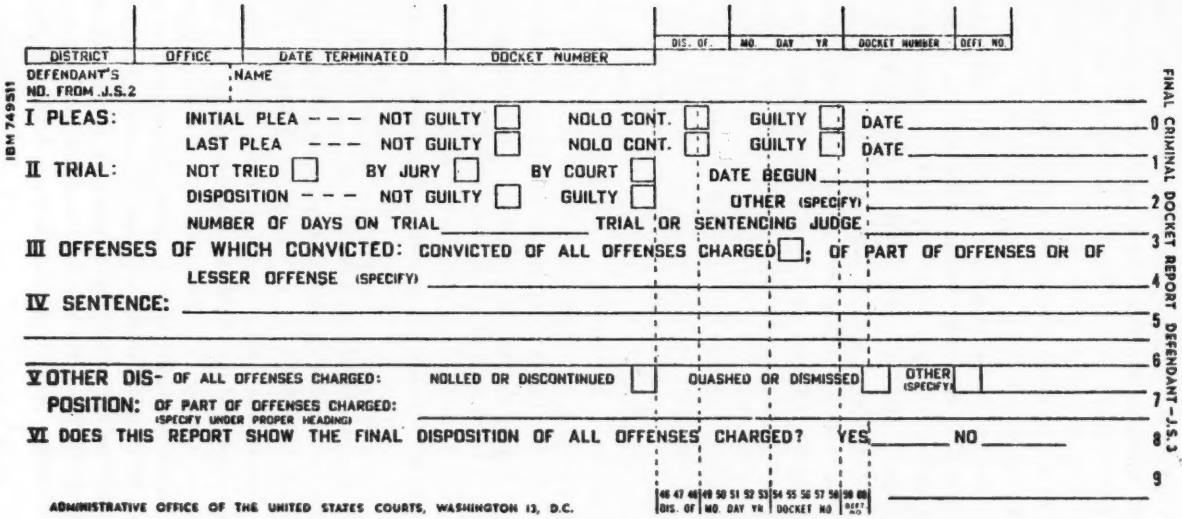

FIG. 4—FINAL CRIMINAL DOCKET REPORT

When legislation with reference to additional judgeships in particular districts is introduced in Congress, it is customary for the House and Senate Judiciary Committees to ask the Administrative Office for a report on the judicial business of those districts. This normally consists of tables showing the flow of cases in the district for some years, an analysis of the types of cases, both civil and criminal, which have been filed, a statement showing the caseload per judge in the district as compared with the average caseload in the federal courts in the United States as a whole, and some comment on the business of the district. Information as to the speed of disposition of civil cases in the district as compared with the general average is also given. In addition, Congress has shown interest in information concerning special types of litigation such as habeas corpus, Fair Labor Standards Act cases involving portal-to-portal claims, and the bankruptcy cases.

In 1946 a law was enacted providing for a system of salaried referees in the federal courts, replacing the previous fee system. The Administrative Office was directed to make a survey of the bankruptcy business and make recommendations concerning the number of referees and the salaries, both of which were to be fixed by the Judicial Conference of Senior Circuit Judges. For this purpose it was necessary to go back into the reports received for the past ten years. Very detailed information by referee was available for the past five years, and this was used in estimating the amount of business the several districts might produce in the future. The earnings of each referee for this period were tabulated for the Conference and were used by it in making its determinations. This was an instance in which figures not published in any tables but available in the Administrative Office files were of great importance in helping the Judicial Conference in its determination of salaries, personnel, and fees to be charged under the new referee act. One of the greatest benefits of the individual card reporting system is that it makes available information which may be needed in the future, and provides a "readiness to serve" feature which is valuable.

CASES UNDER ADVISEMENT

One other form of statistics which the Administrative Office collects should be mentioned. Upon the authorization of the Judicial Conference, the office sends quarterly to each district judge a letter requesting information as to the cases which at the end of the quarter had been held under advisement by him for more than thirty days. If a case has been held more than sixty days it is suggested that the reason why it has not been decided should be given. For the purpose of this report, a case is not regarded as under advisement until it has been fully submitted and all papers filed. This does not include cases in which the decision is being postponed on request of counsel for all parties nor cases in which the court is awaiting the handing down of another opinion. Cases which are held more than sixty days

reports of the Director required to be filed by the provisions of Section 304, Clause 2, and such action shall be taken thereon by the Council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts." 53 STAT. 1223 (1939), 28 U. S. C. §448 (1940).

awaiting the filing of briefs are also to be listed, as are cases which have been referred to masters more than ninety days before the end of the quarter, and in which no report has been filed. The Administrative Office makes a compilation of the answers received, and sends it to the members of the circuit councils, which are made up of the judges in the circuit courts of appeals, each council receiving information concerning cases in that circuit only. The late Judge Otis of Kansas City has said of this report:

> Every three months every federal trial judge receives a little communication . . . asking three questions. . . . I cannot speak for other judges but I do say speaking for myself that the innocent little inquiry coming to me four times a year has affected me even as a spur affects the sluggish steed. Mr. Shafroth's gentle hint does more to stir me, and my colleagues too, than all that Shakespeare in the soliloquy of Hamlet wrote concerning "the evil of the law's delays," than all that Milton uttered in his Latin verse about "the lawyer with his inexhaustible ten year case."

The first report received by the office in 1940 indicated a total of 415 cases or motions within the scope of inquiry, among which were twenty-nine under advisement for more than a year, including six cases which had been held over two years and three which had been held over three years. The second annual report of the Director indicated that by August 1, 1941, the number of cases or motions held over thirty days had been reduced to 314, of which there were but six which had been held more than a year, and in two of those opinions had been drafted but not yet filed. These reports continue to be made each quarter. A recent report shows 225 matters held under advisement over thirty days, of which one was over a year old.

The value placed upon these reports by the Statistics Committee of the Conference is shown by the following statement contained in the Committee's first report:

> Notwithstanding the inconvenience to the individual judges thus called on for statements as to their work, the committee is of the opinion that the furnishing of the quarterly report on cases under advisement to each circuit council, showing the cases under consideration by the district judges in the circuit, is one of the most important functions which the statistical division performs. District judges who have no cases to report are asked to keep in mind that these reports are for the good of the judicial system as a whole, even though in a particular case they may be entirely unnecessary.[18]

The quarterly reports required by the Act are designed to give an up-to-date picture of the condition in each district. They constitute a report on the flow of civil, criminal, and bankruptcy business, with figures giving the number of cases pending at the beginning of the period in each district, the number filed, the number terminated, and the number pending at the end of the period. For the second quarterly report, each year, there is a further refinement showing the types of civil and criminal cases filed in each district for the half-year period. In addition to this purely statistical report, which is accompanied by a general analysis of trends, there is the separate report previously mentioned which goes to the circuit judges

[18] 7 FED. B. JOUR. 292, 299 (1946).

in each circuit, summarizing the information furnished by the district judges of that circuit as to cases under advisement. The fourth-quarter report consists only of this information, as the data for the entire year published in the annual report gives the condition in each district as of June 30.

The Act provides for this annual report, and requires that it be filed with the Congress. It contains a statement by the Director, full information as to the judicial business, an analysis of developments during the year, a general report as to the condition of the dockets, tables showing the time required for disposition of cases by the district courts and by the circuit courts of appeals, further details concerning districts which are reported as in arrears, and a report of the annual meeting of the Judicial Conference of Senior Circuit Judges. A ten-year flow-of-cases table concerning the work of the Supreme Court, derived from the records of the clerk of that Court, is also included, as well as reports from the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, and, for the last three years, the Emergency Court of Appeals, created to hear appeals from determinations of the Office of Price Administration in certain cases. This annual report is printed and distributed to members of Congressional committees, to the federal judiciary, to the clerks of courts, to law libraries, and to certain interested individuals. The quarterly reports are mimeographed and are supplied only to judges, clerks, and officials of the judicial system.

THE STATISTICS COMMITTEE OF THE JUDICIAL CONFERENCE

In the year 1943, the Judicial Conference authorized the appointment of a committee "to consider in consultation with the Director methods of improving the existing scheme of collecting and compiling federal judicial statistics by the Administrative Office." This committee has been of material assistance to the statistical division. It is composed of a group of judges familiar with the operations of the federal courts who meet at least once a year and review the work of the division, make suggestions, propose research projects, review techniques, and make recommendations to the Judicial Conference in the field of judicial statistics.

WEIGHTING THE CASELOAD

The most recent project of the Committee is of such general interest that a brief description of it is in order. Analysis of the caseload in the district courts for the purpose of determining the relative amount of time required by a district judge for the disposition of various types of cases, and particularly of types of civil actions, has been a subject of interest to the committee for some time. It is obvious that the number of cases alone is not an accurate criterion of the amount of work involved in their disposition. This is well illustrated by the fact that the great flood of civil cases filed by the Office of Price Administration for injunction and treble damages in the fiscal years 1945 and 1946 in the district courts of the United States practically doubled the total number of civil cases filed, although it increased the work of the judges by only a comparatively small amount. The Administrative

Office's figures on disposition show that only 3 or 4 per cent of these cases ever reached trial, and that nine out of ten were settled by consent judgment or consent dismissal. Eight district judges were asked by the Committee to keep time records showing the relative amount of time spent on cases of different kinds. The results for a period of three to six months were summarized. The information obtained from that study showed that a great deal more time was put by those judges on private cases than on any other type of litigation which came before them. Particularly in view of the fact that Congress often asks the Administrative Office for information concerning the need for additional judgeships which have been requested in particular districts, the Committee felt a further investigation should be made, and this study is being continued with the cooperation of a number of district judges.

The chairman of the Statistics Committee is Judge Charles E. Clark, of the United States Circuit Court of Appeals for the Second Circuit, who was in charge of the study of the business of the federal courts for the Wickersham Commission, which has already been mentioned. The other members of the Committee are: Judge William Denman, of the Ninth Circuit Court of Appeals, Judge Herbert F. Goodrich, of the Third Circuit Court of Appeals, Judge William H. Kirkpatrick, District Judge of the Eastern District of Pennsylvania, Judge Allen B. Hannay, District Judge of the Southern District of Texas, and Judge Royce H. Savage, District Judge of the Northern District of Oklahoma.

CONCLUSION

Federal judicial statistics are still in a state of development. The adoption of the individual card reporting system and the punch-card method of tabulation has produced a considerable improvement. Since the establishment of the Administrative Office, a principal duty of which is to gather, publish, and interpret judicial statistics, further progress has been made. The office is seeking to develop a system which will meet as nearly as may be the objectives set forth by Justice Felix Frankfurter and Mr. James M. Landis in their excellent work on the federal courts:

> We ought to know how the different districts and different judges dispose of their business, the demands of different classes of litigation upon court time, the expedition or delay in adjudications, the part played by jury trials, the administration of extraordinary remedies, the relation between federal courts and state courts, and the work of the federal courts in regard to litigation involving no peculiar federal questions. Similarly, appropriate annual statistics of the circuit courts of appeals—now happily free from arrears—will give us an authoritative knowledge of courts which, since the Act of 1925, are in so large a measure ultimate courts of appeal. Such an adequate system of judicial statistics, improved and amplified by experience, will, through the critical interpretation of the figures, steadily make for a more vigorous and scientific approach to the problems of the administration of justice.[19]

A great opportunity in this field lies before the Administrative Office, for in no other system, so far as is known, is there now as complete and adequate a method of judicial statistical reporting as is now used by the clerks of court in reporting to that office the business of the federal courts.

[19] FELIX FRANKFURTER AND JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 253-254 (1927).

FEDERAL JURISDICTION AND THE REVISION OF THE JUDICIAL CODE

HERBERT WECHSLER*

The proposed revision of the Judicial Code,[1] approved by the House of Representatives,[2] is now before the Judiciary Committee of the Senate. In form it is a bill to revise Title 28 of the United States Code and to enact it as law rather than presumptive evidence of law. In substance, though the bill advances many changes in existing provisions, it envisages no major alteration in the present distribution of judicial power between national and state courts. If there is need, as has been often said, for searching re-examination of the bases of the district court jurisdiction,[3] it will survive enactment of this draft.

To say this is to appraise but not to criticize the pending bill. Its form and substance were largely predetermined by its origin in the title-by-title re-examination of the United States Code committed to the House Committee on the Revision of the Laws,[4] the duties of which were but recently absorbed by the Judiciary Committee. Such an enterprise presupposes formal and interstitial improvement as the maximum objectives. Moreover, a bill of this scope, whatever its source, can hardly be accepted by the Congress on any other ground than its faith in the competence of the revisers and in the alertness of the bar to call attention to questionable details. To weight the draft with proposals posing controversial issues might well assure that no bill would be passed at all. These were, at least, the premises of the revisers.[5] Within their limits they have not by any means produced a timid work.

This is not the place for a report on all the changes that the bill would work in point of substance—though there is room for larger explanation everywhere than that presented in the Reviser's notes.[6] The wealth of small detail that governs the organization, personnel, and administration of the federal courts lies, for the most

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[1] H. R. 3214, 80th Cong., 1st Sess. (1947); see H. R. REP. No. 308, 80th Cong., 1st Sess. (1947); *Hearings before Subcommittee No. 1 of the Committee on the Judiciary of the House of Representatives on H. R. 1600* and *H. R. 2055*, 80th Cong., 1st Sess. (1947). The bill is discussed in Note, 60 HARV. L. REV. 424 (1947).

[2] 93 Cong. Rec. 8559 (July 7, 1947).

[3] See, *e.g.*, Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499 (1928); MCCORMICK AND CHADBOURN, CASES ON FEDERAL COURTS viii-ix (1946).

[4] See REVISION OF THE FEDERAL JUDICIAL CODE (Committee Print, 1945); H. R. REP. No. 2646, 79th Cong., 2d Sess. (1946) (Report of Committee on Revision).

[5] See *Hearings, supra* note 1, at 11.

[6] The notes are presented as an Appendix to H. R. REP. No. 308, *supra* note 1.

part, well beyond the scope of this symposium. It is enough to say that there is major gain in the redrafting of these old provisions, their adaptation to the superseding sections of the Rules, and ordered concentration in a single place. There is, however, room for close attention to the aspects of the draft that touch the definition of the federal jurisdiction. Where changes have been made, to what extent are they responsive to the problems? What is required that has here been left undone?

I

THE BUSINESS OF THE FEDERAL COURTS

The data is at hand to show in broadest outline the use to which we put the federal judicial institution. The cases filed in lower federal courts in fiscal 1947 showed these totals:[7]

CASES WHERE THE FEDERAL GOVERNMENT IS A PARTY

Criminal prosecutions	31,694
Civil actions by United States in district courts	23,822
Actions against the United States or federal agencies in district courts	5,742
Review of federal boards and commissions in courts of appeals	506
Court of Claims	606
Customs Court	10,567

ALL OTHER CASES

Admiralty	1,766
Arising under federal law	
Bankruptcy	13,150
Other	9,212
Diversity of citizenship	8,692

We must note a relatively small addition to these figures for two other groups of cases: those filed in the Tax Court[8] and those seeking review by the Supreme Court of state adjudications claimed to present substantial federal questions.

The totality of federal judicial business involves, then, well above 100,000 new cases per annum, apart from duplications on appeals within the system of the national courts. The business is derived from three main sources: (1) cases in which the national government is itself a party; (2) cases between private parties that call for application of the federal law; (3) controversies between citizens of different states. To what extent are these the cases on which federal judicial energy should be expended? Should any be remitted to state courts? Should any be included that are now left to the state tribunals? These are the questions posed to Congress in reviewing the delineation in the statutes of the jurisdiction of the federal courts.

There have been periods in our history when questions such as these were marked

[7] See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Tables B 3, C 2, D 2, F 12, G 1, G 3, G 4 (1947).

[8] The REPORT OF THE COMMISSIONER OF INTERNAL REVENUE for fiscal 1946 shows (Table 123, p. 213) dispositions for that year in 2,728 cases. No later data is at hand.

with deepest tension in our federalism. It is a sign of our advance that today they do not often kindle conflict of this kind. Whatever view is held as to the proper scope of federal activity, no major challenge will be offered to the proposition that the federal law must be supreme within its sphere. We have, in short, perceived that the right focus of the problem of federal-state relationships is substantive, not adjective. There is an ever-present issue as to how much can or should be ordered or attempted by the federal authority. There is no issue on the point that what the federal law affirms—the powers, rights, or duties grounded in its sanction—must be sustained with reasonable efficiency. Thus Congress has at least one stable measure for assessing the sufficiency of juridictional determinants: they must provide an adequate machinery for vindication of the federal law.

It does not follow from acceptance of this principle that every case that has a federal ingredient must be drawn to an initial federal forum. The alternative remains to let such cases take their course with others through the state procedures, subject to review by the Supreme Court if claims asserted under federal law have been denied. This method has the virtue of preserving for final resolution by state agencies any issues in the case that turn upon state law; the more numerous or weightier such state ingredients, the more important it may be to have them first determined by state courts. Initial state adjudication also tends, however, to give the states the final voice on any federal questions, for review by the Supreme Court, even when the parties can afford to seek it, can never function on a quantitative basis. It is and ought to be confined to cases of the most pervasive import, selected very largely in the discretion of the Court. The problem is, therefore, to determine when relatively final state determination involves least risk of error upon federal matters, or when such risk as it involves is counterbalanced by the disadvantages of an original jurisdiction in the federal courts. Beyond this lies the special problem of diversity jurisdiction, involving federal adjudication of cases that have only state ingredients and thus present in the most aggravated form the danger that the national tribunals may misapply state law.

It is, of course, to state the issues in the broadest terms to put the problems in this way. No formulae for jurisdiction can reflect with full resiliency the complicated values of our federalism. There is no perfect separation between factors that are relevant to jurisdiction and those that should have bearing only on the manner of its exercise. However well devised the general standards, correctives will be needed in particular situations that are not readily articulated in a statutory rule. But the sum of federal adjudication should represent as prudent use as we can make of the important national resources represented by the federal courts. To what extent is this accomplished by the present statutes and how will it be furthered by the draft?

We need not pause upon provisions dealing with appellate jurisdiction. The Judges' Bill gave the solution for the Supreme Court and, though its language has

been modified, the substance is not altered by the draft.[9] The problems of the circuit courts pose narrow issues, of which the final-judgment rule suggests a prime example;[10] changes in this area are rightly left to the initiative of the Judicial Conference, well equipped to see the situation as a whole. The focus of congressional attention ought to be the lower courts. The jurisdiction and authority conferred on them are the debatable determinants of the uses of the federal courts.

II

THE FEDERAL GOVERNMENT AS LITIGANT

There is the smallest question as to jurisdiction in the largest category of cases that receive initial federal determination: those where the United States or any of its agencies is party to the litigation. Criminal prosecutions under federal statutes should certainly be instituted only in a federal court, within the range of the protections granted by the Bill of Rights. When civil redress is open to the Government, it should be free to seek it in a court of the United States, though there are situations where the litigating officers may well prefer to seek the remedy in state courts. To the extent that relief can be awarded against the United States or agents of the Government, its propriety and measure are quite plainly the prime business of a national court. In all these cases the law to be applied is normally exclusively federal. Even when there are state questions, the impact of state law upon the interests represented by the Government is the subject of a national concern.

Responsive to considerations of this order, existing law provides exclusive jurisdiction in the district courts of "all crimes and offenses cognizable by the United States," and opens those courts to all civil actions "brought by the United States, or by any officer thereof authorized by law to sue." The draft attempts no change of substance in this area.[11] Nor does it purport to alter the prevailing situation with

[9] See H. R. 3214, §§1252-1257, 2101-2106; *cf.* Act of Feb. 13, 1925, c. 229, §14, 43 STAT. 936, 942; FELIX FRANKFURTER AND JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 255 *et seq.* (1927).

Provisions on the composition of the Supreme Court are: §§1-6, 42; on court officers and employees, §§671-676; on rule-making authority, §§2071-2073. The bill retains the present rule that six justices are required for a quorum (§1) and provides (§2109) that when a qualified quorum is unavailable in a case on direct appeal from a district court, the Chief Justice "may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct." In other cases which lack a quorum, "if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term," the bill requires an order of affirmance as in cases of equal division. These provisions build in part on special Congressional precedent. See 58 STAT. 272 (1944), 49 U. S. C. §45 (Supp. 1946). They pose none the less the question why decision by a Supreme Court of five justices is not preferable to final determination by a circuit court of three, or to no federal adjudication at all.

[10] H. R. 3214, §§1291, 1292; *see, e.g.*, Musher Foundation v. Alba Trading Co., 127 F. 2d 9 (C. C. A. 2d 1942); Zalkind v. Scheinman, 139 F. 2d 895 (C. C. A. 2d 1943); *cf.* Reeves v. Beardall, 316 U. S. 283 (1942).

[11] The clause providing jurisdiction in criminal cases is, however, transferred from Title 28 to the pending revision of Title 18 (H. R. 3190, 80th Cong., 1st Sess. §3231), a change of merely formal import if, as is assumed, that Title will be first enacted. The present clause for civil cases (see 28 U. S. C. §41(1) (1940)) is made a separate section (§ 1345) with only verbal changes, including proper reservation of the situations where a special statute has decreed a forum other than the district court.

regard to remedies against the Government, though it incorporates in Title 28 some provisions drawn from other titles dealing with the special courts.[12] Consent to suit against the United States would be maintained in cases where it now is granted.[13] There would be no change in present methods of reviewing action of administrative agencies where the special statutes have defined them.[14] In other situations, the uncertainties and difficulties that beset the remedies against federal officialdom would be unaffected if the bill were law. One would not urge that this bill is the proper setting for a general revision of the remedies against the Government. There are, however, aspects of the problem that are directly raised by Title 28 and should, it seems to me, receive attention here.

1. Neither the present statute nor the draft vests in the district courts a general authority in actions against agencies or officers of the United States based on a claim of illegality in conduct under color of their office. Apart from situations where a method of judicial review is particularly prescribed by statute, the only grant of jurisdiction that includes such cases is that in matters "arising under" the Constitution or the laws.[15] This mode of treatment introduces limitations, such as jurisdictional amount and the rule that federal questions must appear without anticipation of defenses,[16] that have no place in actions against federal officials, which are necessarily of federal concern. Where the relief demanded is injunctive, a defect of federal authority may mean a total lapse of jurisdiction, for it is still doubtful whether state courts are empowered to restrain the action of a federal official taken under color of federal law.[17]

The draft gives some attention to the issue in providing that all actions or prosecutions in state courts against "any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue" may be

[12] Customs Court: H. R. 3214, §§251-255, 871, 872, 1581-1583, 2631-2641; Tax Court: §§271-277 (and alternative §§272 and 273 in Reviser's notes, H. R. REP. No. 308, *supra* note 1, at A 40), 911, 1621, 2551-2560. For companion provisions drawn from Title 28, see: Court of Claims: §§171-175, 791-795, 1491-1504, 2501-2520; Court of Customs and Patent Appeals: §§211-216, 831-834, 1541-1543, 2601-2602.

[13] See especially H. R. 3214, §§1346, 1347, 1491, 1495-1496, 1498, 1504, 2674.

[14] The rule of Dobson v. Commissioner, 320 U. S. 489 (1943), would, however, be abolished by an amendment made upon the passage of the bill in the House (§1294) providing that judgments of the Tax Court shall be reviewable in the circuit courts of appeals "in the same manner and to the same extent as decisions of the district courts in cases tried without a jury." 93 Cong. Rec. 8550 (July 7, 1947).

[15] Judicial Code §24, 28 U. S. C. §41(1940); H. R. 3214, §§1331, 1336, 1337, 1339, 1340, 1343(1).

[16] *See, e.g.*, Louisville & Nashville R. R. v. Mottley, 211 U. S. 149 (1908); *cf.* Bell v. Hood, 327 U. S. 678 (1946).

[17] The question was briefed and argued but left open by the Court in Brooks v. Dewar, 313 U. S. 354 (1941). *Cf.* Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 358 (1930); *In re* Turner, 119 Fed. 231 (S. D. Iowa 1902); Lewis Publishing Co. v. Wyman, 152 Fed. 200 (E. D. Mo. 1907); Armand Schmoll, Inc. v. Federal Reserve Bank, 286 N. Y. 503, 37 N. E. 2d 225 (1941).

removed by the defendants to the district court.[18] This is a proper extension of the removal now allowed to a small number of officials[19] whose cases stand upon no different ground than others. Taken alone, it helps to meet the problem from the point of view of the official who may remove in any proper case. But it does not meet the problem of the plaintiff who both before and after the removal must establish, to maintain the action, that there was a jurisdiction in the *state* court.[20] The solution is to vest a jurisdiction in this type of case in district courts without regard to other factors. With this change made, the bill might well go further and resolve the mooted question on injunctions by providing that relief of this variety may be decreed against a federal officer only by the federal courts.

It should be added that in no case should state law provide the measure of the liability of federal officials acting under honest color of their office—unless the federal law itself submits their conduct to the governance of state authority, as often is the case. What remedies should be accorded against federal action is, it seems to me, a problem for the federal law and, in the silence of the Congress, a law determined by the federal courts. This, as I suggest hereafter, is an aspect of a larger problem that should be dealt with in the draft.[21]

2. A separate basis for the jurisdiction in actions against federal officials based on their official conduct should be accompanied by the elimination of procedural restrictions that are anomalous in cases of this kind. Apart from special statutory remedies, such cases now are treated like any other personal action under federal law. The venue is the district of the residence of the defendants.[22] It is there or in that state that process must be served.[23] There is uncertainty as to the parties in the official hierarchy who must be made defendants.[24] The suit will fail if the defendants who are indispensable cannot all be sued in the same district.[25]

These problems should be met. Where there is substantive basis for a suit against an agency or officer of the United States in relation to official conduct,

[18] H. R. 3214, §1442(a)(1). The second clause quoted in the text seems unhappily redundant in view of the generality of the first.

Officers of the courts and of Congress are the subject of separate provisions in §1442(a)(3) and (4). A "property holder whose title is derived from any such [federal] officer, where such action or prosecution affects the validity of any law of the United States" may remove under §1442(a)(2).

There seems scant justification for the preservation in §1442(b) of Judicial Code §34, 28 U. S. C. §77 (1940).

[19] Judicial Code §33, 28 U. S. C. §76 (1940); Articles of War 117, 10 U. S. C. §1589 (1940); *see* Maryland v. Soper, 270 U. S. 9, 36 (1926); *but cf.* Gay v. Ruff, 292 U. S. 25 (1934).

[20] The doctrine is that a defect in state court jurisdiction survives on removal since in such case the federal authority is derivative. *See* Minnesota v. United States, 305 U. S. 382 (1939); Lambert Run Coal Co. v. B. & O. R. R., 258 U. S. 377 (1922); Lewis Publishing Co. v. Wyman, *supra* note 17. *But cf.* Freeman v. Bee Machine Co., 319 U. S. 448 (1943).

[21] See Part V, *infra*. *Cf.* Bell v. Hood, 327 U. S. 678 (1946), 71 F. Supp. 813 (S. D. Cal. 1947).

[22] Judicial Code §51, 28 U. S. C. §112 (1940); H. R. 3214, §1391.

[23] FED. R. CIV. P., 4(f).

[24] *See, e.g.*, Williams v. Fanning, 68 Sup. Ct. 188 (U. S. 1947); Webster v. Fall, 266 U. S. 507 (1925); Brooks v. Dewar, *supra* note 17; Varney v. Warehime, 147 F. 2d 238 (C. C. A. 6th 1945); 2 MOORE'S FEDERAL PRACTICE 2156 (1938); Notes, 50 HARV. L. REV. 796 (1937), 32 ILL. L. REV. 99 (1937), 50 YALE L. J. 909 (1941), 158 A. L. R. 1126 (1945).

[25] *Cf.* Camp v. Gress, 250 U. S. 308 (1919).

action should lie in any district where the conduct has its impact and the process of that court should run to all defendants, wherever they are found. The parties will then present no problem, for there will be no difficulty in combining both the head of the department and the subordinates, if any, who are immediately involved. There is sufficient precedent for such procedure under special statutes.[26] The principle should be accorded general scope.[27] The defense in cases of this kind is always made through the official channels and is not hampered by the choice of venue. If the location of the trial should pose a problem to the Government, as if it would remove an officer of some importance from the scene where he performs his duties, the draft now gives the right solution in permitting venue to be changed.[28]

A shift to other districts of actions now brought only in the District of Columbia should not, of course, produce a change in the nature or extent of remedies available. There are, however, instances where the territorial authority of the district court within the capital may be broader than the powers of a district court within a state.[29] The differences should be eliminated by providing that all district courts have the authority to grant all remedies against federal officials appropriate to the judicial power, in accordance with the principles of law.[30] Needless to say, no territorial prop is needed to sustain the federal authority to redress excesses of national officers acting under national law.

3. The defense of sovereign immunity, so commonly adduced in actions against Government officials founded on allegedly illegal conduct, should be reconsidered by the Congress with a view to limitation of its scope. Such limitation has, indeed, been the progressive consequence of decisions of the Supreme Court, which recently has stated the criterion as whether "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration."[31] This

[26] *See, e.g.,* Trading With the Enemy Act §9, 40 STAT. 418 (1917), 50 U. S. C. App. §9(1940) (actions against Alien Property Custodian); Nationality Act of 1940 §503, 54 STAT. 1171, 8 U. S. C. §903 (1940) (suit for declaration of United States nationality where right or privilege of national denied by executive authority).

[27] It should also be applied to petitions for habeas corpus which now become moot if there is a change in the subordinate custodian, as when the petitioner is moved out of the district. *See* United States *ex rel.* Innes v. Crystal, 319 U. S. 755 (1943); United States *ex rel.* Lynn v. Downer, 322 U. S. 756 (1944). *But cf. Ex parte* Endo, 323 U. S. 283, 304 (1944).

[28] H. R. 3214, §1404(a): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The provision is not, however, without its own problems. See Braucher, *The Inconvenient Federal Forum,* 60 HARV. L. REV. 908, 930 (1947).

[29] *See* Kendall v. United States, 12 Pet. 524 (U. S. 1838) (mandamus). The problem is, however, of narrow import in view of the breadth of federal equitable relief (see Note, 38 COL. L. REV. 903 (1938)), and the possible impact of §10(b) of the Federal Administrative Procedure Act, 5 U. S. C. A. §1009(b) (Supp. 1946). *But cf.* Land v. Dollar, 330 U. S. 731, 734 (1947), where the action to recover stock allegedly illegally withheld was brought under the District of Columbia Code.

[30] The provision (§1651) that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions agreeable to the usages and principles of law" will undoubtedly be taken as declaratory of previous authority, despite the elimination of the language of the older sections that produced their restrictive implications. See Judicial Code, §§234, 261, 262, 28 U. S. C. §§342, 376, 377 (1940).

[31] *See* Land v. Dollar, *supra* note 29, at 738; *cf.* Mine Safety Co. v. Forrestal, 326 U. S. 371 (1945); Aircraft & Diesel Corp. v. Hirsch, 331 U. S. 752 (1947).

is a plainly narrow standard but it has uncertain reach, the more so for the contradictions in the earlier decisions.[32] The matter is complex but not beyond the possibility of clarification by legislation. There is no place for any doctrine of immunity that serves to insulate national executive officials against liability for injuries threatened or inflicted by their illegal action. Where the Congress has specifically withdrawn a remedy or has prescribed some other method by which it should be sought, that action is itself the governing law and needs no aid from any further concept of immunity. It should suffice, therefore, to limit the immunity to cases where relief cannot be granted unless judgment runs against the United States as such, as distinguished from its officers, and consent to suit has not been granted by an act of Congress. This would, of course, protect the fisc and other public property where title is admittedly in the United States. To the extent that it withdraws immunity it will not affect such other preconditions of relief as standing to complain, exhaustion of administrative remedies, justiciable controversy, or ground for equitable intervention, which have developed in administrative law; nor will it interfere with other proper variations in the extent or measure of judicial review. It will reduce one barrier but nothing more. If this is, none the less, too simplistic a proposal, those who would attack it should at least be called upon to show their cause.

4. One of the few specific provisions in Title 28 for judicial review of federal administrative action is that made for suits to restrain enforcement of orders of the Interstate Commerce Commission, which must be heard by a three-judge court whose judgment is reviewable directly by the Supreme Court.[33] Bills approved by the Judicial Council[34] would alter this plan of the Expediting Act, providing in this and other cases following the system a circuit court review upon the record made by the commission. This proposal to apply the common method of judicial supervision of the federal administrative agencies has been the subject of a separate hearing. Its adoption is to be expected and will, it seems to me, improve the Code.

III

THE VINDICATION OF FEDERAL RIGHTS

The task of vindicating federal rights and duties is not confined to cases where the Government is party litigant. A host of statutes in creating federal causes of action specially provide for their enforcement in the district courts.[35] Apart from

[32] *See* Land v. Dollar, *supra* note 29, at 736-738; Neher v. Harwood, 128 F. 2d 846 (C. C. A. 9th 1942); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060 (1946).

[33] Judicial Code §24(28), 28 U. S. C. §41(28) (1940); 38 STAT. 220 (1913), 28 U. S. C. §47 (1940). H. R. 3214, §§1336, 2321-2325. The bill unifies the procedure for the composition of the three-judge court in this and other cases (§2284).

[34] H. R. 1468, 1470, 80th Cong., 1st Sess. (1947); see ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 23-24 (1947); *Report of the Judicial Conference*, 92 L. Ed. 125, 134 (1947) (disapproving procedural amendments proposed by the Department of Justice).

[35] See the extensive list of such provisions in the Reviser's notes (H. R. REP. No. 308, pp. A 116-117). The consequence of this development has been to destroy the plan of §24 to picture all the bases

these particular provisions, the district courts have jurisdiction generally in civil cases where the "matter in controversy" involves $3000 and "arises under" the Constitution, laws, or treaties of the United States.[36] To some extent the jurisdiction is exclusive, as in bankruptcy proceedings, cases under patent and copyright laws, and admiralty.[37] More usually, and wherever federal authority rests upon the general grant of jurisdiction, it is concurrent with that of state courts. Within this area, however, choice of federal forum is not confined to plaintiffs. Though the complainant has elected to assert his federal right in state proceedings, the defendant may, with some exceptions specially made by Congress, remove the case into the district court.[38] The measure of his right to do so, except in special cases against federal officials[39] or dealt with by the Civil Rights Laws,[40] is whether on the plaintiff's statement of his case he might have brought the suit originally in the federal courts.[41] The revision reproduces this familiar system with small changes to be noted. There are, however, problems here that call for reconsideration.

1. It is unfortunate that, since the Act of 1875, the statute has adopted as a test of jurisdiction in the lower courts the very language that the Constitution gives to measure the authority of Congress to vest such jurisdiction in a federal court: cases "arising under" the Constitution, laws, and treaties. The constitutional clause has properly been given broad construction. The power of the Congress to confer the federal judicial power must extend, as Marshall held,[42] to every case that might involve an issue under federal law. It should extend, I think, beyond this to all cases in which Congress has authority to make the rule to govern disposition of the controversy but is content instead to let the states provide the rule so long as jurisdiction to enforce it has been vested in a federal court. Where, for example, Congress by the commerce power can declare as federal law that contracts of a given kind are valid and enforceable,[43] it must be free to take the lesser step of drawing

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of the jurisdiction and distinguish between cases where the jurisdictional amount is necessary and those where it is not. The bill does not avoid the difficulty by breaking §24 into separate sections, but there is no solution short of re-working all the special statutes along with Title 28.

The revision (§1352) adds to the particular grants of jurisdiction cognizance of "any action on a bond executed under any law of the United States."

[36] Judicial Code §24(1), 28 U. S. C. §41(1) (1940); H. R. 3214, §1331.

[37] H. R. 3214 abandons the device of a separate section defining the exclusive jurisdiction (Judicial Code §256, 28 U. S. C. §371 (1940)) in favor of a separate statement in each instance where the grant of jurisdiction is so intended. See §§1333 (admiralty), 1334 (bankruptcy), 1338 (patent and copyright), 1351 (consuls and vice-consuls as defendants), 1355 (fine, penalty, or forfeiture), 1356 (seizures). The qualification of exclusiveness in admiralty, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it" (Judicial Code, §24(3), 28 U. S. C. §41(3) (1940)), is changed to "any other remedy to which he is otherwise entitled." For an indication of the problems in this reservation, which are unaffected by the change, see Comment, *The Tangled Seine: A Survey of Maritime Personal Injury Cases*, 57 YALE L. J. 243 (1947).

[38] Judicial Code §28, 28 U. S. C. §71 (1940), H. R. 3214, §1441.

[39] See notes 18 and 19 *supra*.

[40] Judicial Code §31, 28 U. S. C. §74 (1940); H. R. 3214, §1443.

[41] *See, e.g.*, Tennessee v. Union and Planters' Bank, 152 U. S. 454 (1894).

[42] Osborn v. Bank of the United States, 9 Wheat. 738 (U. S. 1824).

[43] See Forrester, *The Jurisdiction of Federal Courts in Labor Disputes*, this symposium.

suits upon such contracts to the district courts without displacement of the states as sources of the operative, substantive law. A grant of jurisdiction is, in short, one mode by which the Congress may assert its regulatory powers. A case is one "arising under" federal law within the sense of Article III whenever it is comprehended in a valid grant of jurisdiction as well as when its disposition must be governed by the national law.

Needless to say, Congress has not meant to grant the district courts a general jurisdiction in every case involving the jurisdictional amount in which it could confer judicial power under any of its sources of authority. That would have brought to federal adjudication all cases in the western states involving devolution of the public lands.[44] There is hardly any limit to the cases it would draw today. The courts have been obliged, therefore, to draw a line between the power and the purpose of the Congress, even though their verbal measure is the same. Though the decisions are not free from vacillation,[45] their essential purpose is to hold the meaning of the statute limited to cases where the plaintiff's cause of action, the rule of substance under which he claims the right to have a remedy, is the product of the federal law.[46] This seems quite plainly the correct solution and one that would be happily adopted by the statute. The general clause should not be cast in constitutional language. Its scope should be expressly limited to cases where the plaintiff's *claim for relief is founded* on the Constitution, laws, or treaties. This change would have the added virtue of dismissing the recurrent thought that jurisdiction should not hold, though the asserted right is federal, if the case does not involve construction of the law but only finding of the facts to which the law must be applied.[47] The federal courts do not sit to give material for law review articles. Their business is the vindication of the rights conferred by federal law.

2. I have suggested that there should be no amount requirement in actions against federal officers. I submit, beyond this, that the amount in controversy has no place in judging the propriety of the original jurisdiction in any case involving rights asserted under federal law. This is not, of course, to say that federal claims may not receive sufficient vindication in the state tribunals, subject to review when it is granted by the Supreme Court. But whether there should be an initial federal forum turns on the calculus of risks and benefits to which I have alluded previously. The relevant considerations are such factors as the danger of hostility within the states to the particular federal affirmation, the need and value of a fairly specialized tribunal, the hardship to a party if his adversary can draw the litigation to what is often a remoter forum than the state court, the defects in state remedial systems

[44] *See, e.g.*, Shoshone Mining Co. v. Rutter, 177 U. S. 505 (1900).

[45] See Chadbourn and Levin, *Original Jurisdiction of Federal Questions*, 90 U. OF PA. L. REV. 639 (1942); Forrester, *supra* note 43.

[46] *See, e.g.*, Gully v. First Nat. Bank, 299 U. S. 109 (1936); Puerto Rico v. Russell & Co., 288 U. S. 476 (1933). Cases where state law incorporates federal standards by reference present a close question. *See* Smith v. Kansas City Title Co., 255 U. S. 180 (1921); *cf.* Moore v. Chesapeake & Ohio Ry., 291 U. S. 205 (1934).

[47] Chadbourn and Levin, *supra* note 45; Note, 40 ILL. L. REV. 387 (1947).

that may impair the vindication of the federal right. Amount has far too little bearing on these factors to employ it anywhere within this area as a decisive test.[48] So Congress has conceived in dispensing with the standard in many, if not most, cases arising under federal statutes. There is far less reason for its maintenance when rights are asserted under treaty or the Constitution. Yet these are the very cases where, apart from actions founded on the Civil Rights Laws, the general clause provides the only basis for the jurisdiction and the amount requirement holds.

That the elimination of amount would work no inundation of the district courts is plain enough from the statistics. Most of the cases where the jurisdiction rests on federal question and the national government is not party to the action arise under statutes which already have dispensed with the requirement, as Table 1[49] shows.

TABLE 1

CIVIL CASES COMMENCED IN THE UNITED STATES DISTRICT COURTS DURING THE FISCAL YEAR 1947 WHERE FEDERAL QUESTION WAS BASIS OF JURISDICTION

Total	9,216	Bankruptcy (other than proceedings proper)	111
Copyright	176	Civil Rights Act	50
Employers' Liability Act (Railroads)	697	Constitutionality of state statutes	39
Fair Labor Standards Act		Freight rates (I. C. C.)	188
Portal-to-portal	2,236	National bank receivers	3
Other	1,248	Price control (O.P.A. private)	1,095
Habeas corpus	485	Perishable Commodities Act	33
Jones Act	1,607	Railway Labor Act	34
Miller Act (U. S. sub-contractor)	66	Trade-mark	155
Patent	372	Selective service; re-employment	425
Antitrust	63	Securities legislation	29
		Other	100

It is quite inconceivable that in fields now governed by the general grant of jurisdiction a flood of litigation involving less than the required amount waits impatiently at federal doors. But if reduction should be necessary in the number of federal cases, it should be accomplished by a standard more relevant than the amount in controversy to the desirability of initial federal adjudication. A survey of the federal statutory actions would speedily show those which can most prudently be relegated to enforcement in the state courts.

[48] For the close distinctions often made in calculation of amount, *see, e.g.*, Healy v. Ratta, 292 U. S. 263 (1934); Note, 34 COL. L. REV. 311 (1934).

[49] Based on ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1947), Table C 2, supplemented by information provided by Mr. Leland L. Tolman of the staff of the Office.

3. Of all the litigation in which federal rights are asserted, the states have largest interest in cases where the claim is that state action—legislative or administrative—violates the federal Constitution or conflicts with national law. The tension that such cases formerly engendered[50] is largely reduced today by changes both in constitutional doctrine and in the principles that govern exercise of the original jurisdiction. The time is ripe, therefore, to frame a stable settlement. Its terms have been foreshadowed by developments in legislation and decision during recent years.

It will be helpful to recall the position when the controversy was at its height. A substantial claim of federal invalidity in action by state officials threatening "irreparable injury" gave basis for a suit for an injunction, arising under the Constitution. The jurisdiction attaching on that ground extended to "all the questions in the case."[51] Decision might be placed, therefore, on state law, such as interpretation of the statute or even a finding of its invalidity under the state constitution. Indeed, to grant relief upon state grounds was deemed to be the preferable resolution, since it dispensed with an interpretation of the federal constitution.[52] In this state of jurisdictional doctrine, improvident injunctions issued on both state and federal grounds. Objection that such suits were in effect against the state and barred by the Eleventh Amendment was rejected,[53] as was also the companion point that state action violating the Fourteenth Amendment—the jurisdictional averment—could not be premised upon conduct claimed to be unauthorized by state law.[54]

Congress addressed itself to the problem in several stages. It struck early at the possible improvidence of single district judges by requiring three judges when the suit demanded a preliminary injunction restraining upon constitutional grounds the enforcement of state statutes or administrative orders; and it provided in such cases a direct appeal to the Supreme Court. It also stayed the hand of federal equity if

[50] See, *e.g.*, Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499, 519 (1928); Lilienthal, *The Federal Courts and State Regulation of Public Utilities*, 43 HARV. L. REV. 379 (1930); Lockwood, Maw, and Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426 (1930); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930).

[51] Siler v. Louisville & Nashville R. R., 231 U. S. 175, 191 (1909).

[52] *Ibid.*; Greene v. Louisville & Interurban R. R., 244 U. S. 499 (1917); Cincinnati v. Vester, 281 U. S. 439 (1930).

[53] *Ex parte* Young, 209 U. S. 123 (1908).

[54] *See* Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278 (1913); Mosher v. City of Phoenix, 287 U. S. 29 (1932); Isseks, *Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials*, 40 HARV. L. REV. 969 (1927); Note, 31 COL. L. REV. 669 (1931).

The doctrine that official conduct cannot constitute action by a state within the limitations of the Fourteenth Amendment when such conduct is forbidden by the state's law (see Holmes, J., dissenting in Raymond v. Chicago Traction Co., 207 U. S. 20, 41 (1907)), would have served to route these civil cases through the state courts. *See* Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239 (1931); *cf.* Barney v. New York, 193 U. S. 430 (1904). But it would also have cast doubt upon the power of Congress to prescribe criminal sanctions to safeguard rights protected by the Amendment against their irrevocable destruction by the action of state officials (*cf.* Screws v. United States, 325 U. S. 91, 147-148 (1945)) in contravention of the purpose of the enforcement clause (*cf. Ex parte* Virginia, 100 U. S. 339, 347 (1880)).

before the final hearing the state instituted suit for the enforcement of the statute or the order in its own courts and suspended its effectiveness until the final judgment.[55] The next steps came more than two decades later. The Johnson Act in 1934[56] forbade injunctions restraining compliance with or the enforcement of administrative orders affecting "rates chargeable by a public utility" when (1) the basis of jurisdiction was diversity of citizenship or the constitutional invalidity of the order; (2) the order was made after reasonable notice and hearing and did not interfere with interstate commerce; and (3) "a plain, speedy and efficient remedy" in law or equity might be had in the state courts. A less qualified enactment[57] in 1937 barred federal suits to enjoin "the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any State" upon the same condition, that a "plain, speedy and efficient" remedy was available within the state. These statutory developments are, of course, embodied in the pending bill.[58] The only change in substance is extension of the three-judge court requirement to suits for injunction in which the plaintiff does not ask preliminary relief.[59]

The courts have moved, however, well beyond the statutes. Initial decisions, addressed to the danger in such cases that relief might be erroneously granted on state grounds, employed the device of retaining jurisdiction to permit correction of the judgment if the state should subsequently hold the ground untenable.[60] In that event, the federal court would be obliged to reach the federal question; and the plaintiff would retain his judgment if his federal claim should be sustained. But federal decision on doubtful state grounds was no more attractive an alternative than the unnecessary adjudication of doubtful constitutional questions—unnecessary in the sense that the determination might be avoided or much simplified if state questions could be first decided by the authoritative judgment of state courts. Neither possibility could be viewed with satisfaction by judges sensitive to the unwisdom of unnecessary federal intrusion in state matters and aware that any federal claims surviving an examination of the issues by the state tribunals could be vindicated by the Supreme Court.

The result, of course, was the prevailing doctrine of equitable abstention: when the plaintiff seeks a declaration that state action violates the federal Constitution, and the case involves preliminary or alternative state questions of some difficulty (as where interpretation of the statute is in doubt), and there is, finally, no bar to an effective remedy in state courts, the proper course is to remit the suitor to those courts.[61] To be sure, the federal court will normally retain its jurisdiction of the

[55] Judicial Code §266, 28 U. S. C. §380 (1940); see Pogue, *State Determination of State Law and the Judicial Code*, 41 HARV. L. REV. 623 (1928).

[56] 48 STAT. 775 (1934), 28 U. S. C. §41(1) (1940).

[57] 50 STAT. 738 (1937), 28 U. S. C. §41(1) (1940).

[58] H. R. 3214, §§1341, 1342, 2281, 2284. [59] *Id.* §2281.

[60] Glenn v. Field Packing Co., 290 U. S. 177 (1933); Wald Transfer & Storage Co. v. Smith, 290 U. S. 602 (1933), Lee v. Bickell, 292 U. S. 415 (1934).

[61] *See* Railroad Commission v. Pullman Co., 312 U. S. 496 (1941); Chicago v. Fieldcrest Dairies, 316 U. S. 168 (1942); Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293 (1943); Spector

action, but this is hardly matter of significance. The plaintiff in the state proceeding will present his claims in full, both state and federal; if he fails within the state, his recourse on the federal issue will not be to return to the original federal jurisdiction but rather to obtain review in the Supreme Court. This *modus operandi* is now firmly based in the decisions.[62]

The development described should be extended by the statute to deny original jurisdiction in all cases that present a claim of federal invalidity in state legislative or administrative action where, in the language of the present statutes, a "plain, speedy and efficient remedy" is available in the state courts. There is no reason to exempt from application of this principle the small residuum of cases to which present limitations may be held inapplicable, as where state law is not conceived to be uncertain or the constitutional issue is presented in an action that would formerly have been at law. The crucial point is one of general validity: it is that application of the federal authority to invalidate the action of a state is best accomplished when the issue finds its way to the Supreme Court after it has had examination in the state courts. This is, moreover, the kind of situation where review by the Supreme Court is neither doubtful nor unduly burdensome if there is substantial basis for the claim of invalidity; appeal will often lie of right,[63] and when it does not, certiorari will but rarely be denied; adverse findings on the facts will not, unless supported, defeat reversal for denial of a federal right.[64] Further, this is typically the kind of case that would not be determined through the avenue of the original jurisdiction without ultimately reaching the Supreme Court. Accordingly, the only basis for retention of original jurisdiction is that state remedies may be too uncertain, slow, or ineffective—matters that call for judgment in particular situations; where that is found to be the case, original jurisdiction would and ought to be preserved.[65]

Motor Service, Inc. v. McLaughlin, 323 U. S. 101 (1944); Alabama State Federation of Labor v. McAdory, 325 U. S. 450 (1945); A. F. of L. v. Watson, 327 U. S. 582 (1946). But in Railroad Commission v. Rowan & Nichols Oil Co., 310 U. S. 573 (1940), having first considered the constitutional claim, with denial of relief, the Court felt obliged on rehearing (311 U. S. 614) to pass on the state ground urged, holding it to be insufficient as well.

The values embodied in the doctrine are, of course, also reflected in part in the criteria that otherwise determine whether there is a basis for equitable relief. *See, e.g.*, Cavanaugh v. Looney, 248 U. S. 453 (1919); Matthews v. Rodgers, 284 U. S. 521 (1932); Spielman Motor Sales Co. v. Dodge, 295 U. S. 89 (1935); Beal v. Missouri Pacific R. R. Corp., 312 U. S. 45 (1941).

[62] The differences that have arisen lie primarily in situations where diversity affords an independent basis for the jurisdiction and this is urged to lend compulsion to decision on state grounds. *See* Burford v. Sun Oil Co., 319 U. S. 315 (1943); *cf.* Meredith v. Winter Haven, 320 U. S. 228 (1943); Hawks v. Hamill, 288 U. S. 52, 60-61 (1933). *But see* also Public Utilities Commission v. United Fuel Gas Co., 317 U. S. 456 (1943).

I urge hereafter that if diversity is to be retained, there should at least be no compulsion to adjudicate upon uncertain state grounds. Compare the technique employed in Thompson v. Magnolia Petroleum Co., 309 U. S. 478 (1940) to obtain a state determination of a difficult state question arising in a bankruptcy proceeding.

[63] *See, e.g.*, Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921).

[64] *See e.g.*, Fiske v. Kansas, 274 U. S. 380 (1927).

[65] *See, e.g.*, Hillsborough v. Cromwell, 326 U. S. 620 (1946). Injunctions against proceedings in state courts present an analogous problem. The bill (§2283) would restore the so-called "relitigation" exception to the prohibition of Judicial Code §265, 28 U. S. C. §379, existence of which was denied in

These observations call for qualification in one instance: the rights of action specially conferred by Congress in the Civil Rights Laws.[66] There Congress has declared the historic judgment that within this precious area, often calling for a trial by jury, there is to be no slightest risk of nullification by state process. The danger is unhappily not past. It would be moving in the wrong direction to reduce the jurisdiction in this field—not because the interest of the state is smaller in such cases, but because its interest is outweighed by other factors of the highest national concern.[67] Needless to say, to formulate the scope of the exception is no drafting problem; its measure is the rights of action given by the Civil Rights Laws.[68]

4. The doctrine that would bar original jurisdiction to invalidate state action when there is a "plain, speedy and efficient" remedy in state courts presupposes that the party who objects to jurisdiction will establish that the remedy obtains.[69] There is, however, one important case that should be governed by this principle where under present law and under the revision the burden is imposed the other way. This is the case of federal habeas corpus in so far as it is used to challenge upon federal grounds the validity of detention under criminal conviction in state courts.

The issue has, of course, been brought to prominence in recent years by decisions of the Supreme Court expanding the procedural requirements of due process in state criminal proceedings and holding that, to some extent at least, when such requirements have been denied a judgment cannot stand even on collateral attack. Since federal habeas corpus runs in any case of imprisonment "in violation of the Constitution or of a law or treaty of the United States,"[70] the writ has been sought increasingly to challenge state convictions on such grounds. The Supreme Court has, however, held that principles of comity preclude this resort to original jurisdiction unless state remedies have been exhausted by the petitioner. Its doctrine is that a district court should entertain the petition where "resort to state court remedies has failed to afford a full and fair adjudication of the federal contention raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate."[71] The application of the doctrine has produced much obvious procrastina-

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Toucey v. New York Life Insurance Co., 314 U. S. 118 (1941), by sanctioning restraint by a federal court "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Under the rule of the *Toucey* case the claim of res adjudicata would be asserted in the state court but its erroneous denial would, of course, present a federal question. See Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 YALE L. J. 1169 (1933); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345 (1930).

[66] 8 U. S. C. §§43, 47, 48 (1940); Judicial Code §24(12), (13), (14), 28 U. S. C. §41(12), (13), (14) (1940).

[67] See TO SECURE THESE RIGHTS, REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS (1947).

[68] The normal requirements for equitable relief apply, however, in this area as well. *See* Douglas v. City of Jeannette, 319 U. S. 157 (1943); *cf.* Hague v. C. I. O., 307 U. S. 496 (1939).

[69] See Hillsborough v. Cromwell, *supra* note 65; Driscoll v. Edison Co., 307 U. S. 104 (1939); Mountain States Power Co. v. Public Service Comm'n, 299 U. S. 167 (1936).

[70] REV. STAT. §753, 28 U. S. C. §453 (1940); H. R. 3214, §2241(c)(3).

[71] *Ex parte* Hawk, 321 U. S. 114, 118 (1944).

tion in the situation where state post-conviction remedies are shrouded in uncertainty, and countless theoretical contingencies remain to be resolved.[72]

The draft has properly addressed itself to this and other[73] problems of the federal habeas corpus, but both its language[74] and the substitute[75] proposed by the Judicial Conference perpetuate the difficulty noted. It should be met by recognition that these cases do not warrant treatment different from that given others which invoke original jurisdiction to invalidate state action; the jurisdiction should be open not when it is plain that the state courts provide no remedy, but rather unless the availability of such a remedy is clear.[76] The consequence, we may be certain, will be rapid clarification of state remedies; for it is obviously to state advantage to channel re-examination of convictions through its own judicial processes, subject to review by the Supreme Court.

5. Attention has been called in the discussion of state-action cases to the scope of the original jurisdiction based on federal question, in so far as it includes companion claims to remedy founded solely on state law. The doctrine was, as has been noted, that jurisdiction vesting on the basis of the federal question extended to all questions in the case. The same issue also arose in actions under federal statutes in which the plaintiff claimed relief on state as well as federal grounds. A different rule developed here—especially in patent, trade-mark, and copyright cases—limiting the scope of jurisdiction in such statutory actions to the claim raised under federal law.[77]

[72] See, *e.g.*, Rutledge, J., concurring in Marino v. Ragen, 68 Sup. Ct. 240, 241 (U. S. 1947); Note, 15 U. OF CHI. L. REV. 107, 118 (1947); Note, 22 IND. L. J. 262 (1947).

[73] The order to show cause procedure sanctioned in Walker v. Johnston, 312 U. S. 275 (1941), is expressly provided (H. R. 3214, §2243). A second petition after a prior determination is barred if it presents no "new grounds" (§2244). A judicial certificate "setting forth the facts occurring at the trial" is rendered admissible in evidence (§2245). Proof by affidavit is allowed in the discretion of the court, subject to a right to cross-examine by written interrogatories (§2246). Federal sentencing courts are authorized to hear on motion to vacate any grounds for collateral attack and resort to such motion is made a prerequisite to habeas corpus (§2255).

These provisions are largely based on the bills recommended by the Judicial Conference (H. R. 4232, 4233, 79th Cong., 1st Sess.); see *Report of the Judicial Conference of Senior Circuit Judges* 23-24 (1943); see also *Report of the Judicial Conference*, 92 L. Ed. 125, 133 (1947).

[74] The draft (§2254) is plainly in error in extending the rule to all persons in custody pursuant to "authority of a State officer." *Cf. In re* Neagle, 135 U. S. 1 (1890); *In re* Loney, 134 U. S. 372 (1890); Wildenhus's Case, 120 U. S. 1 (1887).

[75] See *Report*, 92 L. Ed. 125, 134 (1947): "An application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state or that there is no adequate remedy available in such courts. An applicant shall not be deemed to have exhausted the remedies available in the courts of the state, within the meaning of this section, if he has the right under law of the state to raise the question presented by any available procedure. The phrase 'no adequate remedy' as used in this section means the absence of state corrective process or the existence of exceptional circumstances rendering such process ineffective to protect the rights of the prisoner."

The Judicial Conference also proposed a far preferable alternative to §2244 relaxing the rigor of the finality rule proposed by the bill, while permitting denial of a petition presenting no new ground if "the judge or court is satisfied that the ends of justice will not be furthered by such inquiry."

[76] See Rutledge, J., concurring in Marino v. Ragen, *supra* note 72.

[77] *See, e.g.*, Leschen Rope Co. v. Broderick, 201 U. S. 166 (1906); Stark Bros. Co. v. Stark, 255 U. S. 50 (1921); Planten v. Gedney, 224 Fed. 382 (C. C. A. 2d 1915); Levering & Garrigues Co. v. Morrin, 61 F. 2d 115 (C. C. A. 2d 1932), *aff'd on other grounds*, 289 U. S. 103 (1933); see Note, 32 COL. L. REV. 291, 296 (1932).

The contrary lines of doctrine confronted the Supreme Court in *Hurn* v. *Oursler*,[78] an action for infringement of a copyright accompanied by claims of unfair competition in the plagiarization of both the copyrighted document and another but uncopyrighted version of the same play. Decision held the jurisdiction not confined to the adjudication of the statutory claim but limited to state-created rights involved in the "same cause of action," a concept measured for this purpose by the element of unity provided by the copyrighted play.[79] Presumably, the cause-of-action doctrine with its test of substantial identity in operative facts would now apply to any type of case. It is, however, plain that application of the principle has been a source of constant difficulty and has led to close distinctions that seem hardly to have bearing either on the general values that should govern in the administration of justice or on the special value of avoiding federal intrusion in state spheres.[80]

The draft deals with the issue only in so far as it involves the conjunction with alleged infringement in the patent, copyright, and trade-mark cases of a claim of unfair competition, grounded necessarily[81] upon state law. It provides[82] that jurisdiction shall extend to unfair competition "when joined with a substantial and related claim" under the federal statutes. The notes of the Reviser imply that he has based this formulation on the decision in *Hurn* v. *Oursler*. It is quite plain, however, that if the word "related" is accorded any portion of its normal meaning it will substantially expand the scope of jurisdiction. Many circumstances will suffice to show relation where the grievances would not be held to rest on operative facts sufficiently identical to keep the cause of action "single," within the purport of the present rule.

It would be wiser if the bill attempted a more general solution and one that would have greater relevancy to the required separation of authority within the federal-state relationship. There is a vice in federal adjudication on state grounds inhering in the fact that federal courts are not the authorized expositors of state law; there is no mechanism by which their errors in such matters can be corrected on appeal by state courts. There is a vice also, as we have recognized by liberal rules of joinder,[83] in forcing plaintiffs who have multiple bases of action to pursue their remedies in pieces and in different courts.[84] It is, however, possible to find a balance

[78] 289 U. S. 238 (1933); see Note, 32 COL. L. REV. 688, 699 (1932); Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 YALE L. J. 393 (1936).

[79] *Cf.* Armstrong Co. v. Nu-Enamel Corp., 305 U. S. 315, 325 (1938): "Registration of 'Nu-Enamel' furnished a substantial ground for federal jurisdiction. That jurisdiction should be continued to determine, on substantially the same facts, the issue of unfair competition." *See also* Southern Pac. Co. v. Van Hoosear, 72 F. 2d 903 (C. C. A. 9th 1934) (interstate and intrastate rates as alternative grounds for relief).

[80] *See, e.g.*, the decisions cited *supra* note 10; Note, 52 YALE L. J. 922 (1943).

[81] *See* Pecheur Lozenge Co. v. National Candy Co., 315 U. S. 666 (1942). That the applicable law is unaffected by whether jurisdiction rests on diversity or on the companion federal claim is ably demonstrated by Wyzanski, J., in National Fruit Product Co. v. Dwinell-Wright Co., 47 F. Supp. 499 (D. Mass. 1942). The contrary view is stated by Zlinkoff, *Erie v. Tompkins: In Relation to the Law of Trade-Marks and Unfair Competition*, 42 COL. L. REV. 955 (1942).

[82] §1338(b). [83] FED. R. CIV. P., 18, 20.

[84] Needless to say, the vice is greatest when, as in patent and copyright cases, the federal jurisdiction is exclusive with respect to the federal claim; the plaintiff cannot avoid fragmentation by resort to the

for these evils. The balance is achieved if jurisdiction is extended generally to claims that under joinder rules may be asserted in a single action, subject to discretion in the court to dismiss without prejudice claims resting upon state law. When uncertainty obtains as to prevailing local doctrine, when that doctrine is enmeshed in clashing policies that render any legal formulation an intrinsically changing concept, the discretion would be exercised to limit federal adjudication to the federal grounds. When, on the contrary, the issue turns on principles well settled by the state, the federal courts can safely undertake the full adjudication of the case. This is the very plan adopted by the draft in dealing with removal from state courts.[85] It should be given general application in measuring the scope of the original jurisdiction based on federal question. Provision might be made to toll statutes of limitation while the claim is pending in the federal court.

6. The bill retains the rule of present law that a defendant may remove a case in a state court founded on a federal "claim or right"—provided it is one "of which the district courts have original jurisdiction."[86] The rule has quite anomalous implications. Though the plaintiff who puts forth the federal claim is content to seek its vindication in the state tribunals, the defendant may insist upon an initial federal forum. When, on the other hand, the plaintiff's reliance is on state law and the defendant claims a federal defense, neither party may remove[87]—except, of course, the special case, to which attention has been called, of actions against federal officials. Nor is there either original jurisdiction or removal where both the initial claim and the defense rest on state law but the plaintiff contends that the defense put forth is nullified by federal law.[88]

It would, it seems to me, be far more logical to shape the rule precisely in reverse, granting removal to defendants when they claim a federal defense against the plaintiff's state-created claim and to the plaintiff when, as the issues have developed, he relies by way of replication on assertion of a federal right. The need is to

state court. *Cf.* Clark, J., in Musher Foundation v. Alba Trading Co., 127 F. 2d 9, 11 (C. C. A. 2d 1942): "If the roast must be reserved exclusively for the federal bench, it is anomalous to send the gravy across the street to the state court house."

[85] §1441(c): "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

This provision is not limited to diversity cases, though apparently drafted with them in mind. See Reviser's notes, pp. A-133-134. It has the result, novel in federal question cases generally, of conferring a broader jurisdiction on removal than when action is instituted in the district court.

[86] §1441(a), Judicial Code §28, 28 U. S. C. §71 (1940). The consequence of the formulation is that the complaint must show that the action arises under federal law. Tennessee v. Union & Planters' Bank, 152 U. S. 454 (1894). In so far as removal has been specially forbidden by Congress (*e.g.*, §1445) the bill would work no change. Removal procedure would be happily simplified (§§1446-1450).

[87] Tennessee v. Union & Planters' Bank, *supra* note 86; Walker v. Collins, 167 U. S. 57 (1897). The plaintiff's removal, originally provided in the Act of 1875 (Railroad Co. v. Mississippi, 102 U. S. 135 (1880)) was eliminated by the Acts of 1887 and 1888.

[88] Louisville & Nashville R. R. v. Mottley, 211 U. S. 149 (1908). Jurisdiction may depend therefore on whether the equitable or the legal tradition determines what the plaintiff must allege. *See, e.g.*, White v. Sparkill Realty Corp., 280 U. S. 500 (1930).

remember that the reason for providing the initial federal forum is the fear that state courts will view the federal right ungenerously. That reason is quite plainly absent in the only situation where, apart from federal officers, removal now obtains: the case where the *defendant* may remove because the *plaintiff's* case is federal.[89] If in any case the reason can be present, it is only in the situations where removal is denied.

The statute ought to be reshaped in terms of a consistent theory that permits removal by the party who puts forth the federal right, or else removal should be dropped entirely in cases where the jurisdiction is based on federal question. To drop it seems to me the better course, for reasons indicated in the discussion of the state-action cases. When the defendant claims a federal defense to an asserted right founded on state law, his assertion is, in substance, that there is *pro tanto* invalidity in the demanded application of that law. The same is true when federal grounds are first advanced to push aside a state defense to a state cause of action. In both these situations, therefore, the matter should be viewed in terms of principles appropriate to state-action cases. And since there is no doubt in either case of adequacy of state remedy, the statute should confine the litigation to state courts. No one would urge that criminal cases in state courts should be removable generally because a federal defense is interposed. The reason holds for civil litigation too. There is no need for the original jurisdiction when litigants rely on federal rights to furnish them a shield but not a sword.

What has been said is not intended to refer to actions against federal officers founded on official conduct. Such cases are, as has been said, of special federal interest because they constitute, in substance, suits against the national Government. The bill correctly deals with them in separate sections, providing a removal on that ground.[90]

IV

DIVERSITY OF CITIZENSHIP

A substantial segment[91] of the business of the district courts in cases where the

[89] It is not surprising therefore that the number of removals on this ground is always very small, only 87 cases in fiscal 1947. See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table C-2 (1947).

[90] See note 18 *supra*.

[91] The Administrative Office reports the proportion of all civil cases (other than bankruptcy) based on diversity as follows:

	1940	1941	1942	1943	1944	1945	1946	1947
Total civil cases	26756	28909	29592	28166	29742	52144	57512	48809
Total diversity of citizenship cases	7252	7286	7135	5468	5233	5268	6242	8692
Percent of diversity of citizenship cases	25.2	27.1	24.1	19.4	17.6	10.1	10.9	17.8

The war-time years reflect both the decline in private litigation and the great volume of OPA cases. The proportion of diversity cases is, of course, much higher if government litigation is eliminated from the total of civil cases. *See, e.g.*, the table in Part I, *supra*. Rough estimates of the Administrative Office showed 29 per cent of all trial days devoted to diversity cases in fiscal 1942, 19 per cent in fiscal

Federal Government is not a party derives from the jurisdiction in controversies between citizens of different states. This and the companion case where the authority is based on citizenship and alienage pose the deepest issue of the uses of the federal courts. In these instances the jurisdiction is employed not to vindicate rights grounded in the national authority but solely to administer state law. Withdrawal of these cases from the state judicial processes involves, therefore, a patent violation of the principle so strongly urged originally to justify the federal judicial power: that judicial authority must be coextensive with the legislative.[92] The state judicial power is less extensive than its legislative when a portion of the task of state administration is assumed by federal courts whose judgments are not subject to a state review. The problem is, therefore, whether this exceptional judicial undertaking rests on some present, valid, federal purpose. If not, it is a function that should plainly be surrendered to the states.[93]

The nature of the cases in which diversity brings federal adjudication is suggested with some clarity in Table 2, drawn from the reports of the Director of the Administrative Office.[94]

It would be difficult to think of litigation posing problems more intrinsically local than pictured by this data.

Those who defend the jurisdiction point, of course, to the original fear of prejudice against the litigant from out of state[95] and argue that the danger is not gone today.[96] I share the view that this provides an insufficient answer, that when this sentiment exists and works unfairness, the protection must be found, as in the

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1946, and 24 per cent of days not devoted to the exceptional war-time work in OPA and Selective Service cases. For earlier data see Charles E. Clark, *Diversity of Citizenship Jurisdiction of the Federal Courts*, 19 A. B. A. J. 499 (1933); AMERICAN LAW INSTITUTE, A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, Pt. II, 47, 99-100, 102, 205 (1934).

[92] *Cf.* The Federalist No. LXXX (Hamilton): "If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number." See also 1 ANNALS OF CONGRESS 843 (Madison) (1789).

[93] For Senator Norris' reports from the Senate Judiciary Committee favorable to abolition of diversity jurisdiction, see SEN. REP. No. 530, 72d Cong., 1st Sess. (1932); SEN. REP. No. 691, 71st Cong., 2d Sess. (1930). See also Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORN. L. Q. 499, 520 *et seq.* (1928); Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. OF PA. L. REV. 869 (1931); Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, 79 U. OF PA. L. REV. 1097 (1931); *Limiting Jurisdiction of Federal Courts—Comment by Members of Chicago University Law Faculty*, 31 MICH. L. REV. 59 (1932); Parker, *The Federal Jurisdiction and Recent Attacks Upon It*, 18 A. B. A. J. 433, 437-439 (1932); Howland, *Shall Federal Jurisdiction of Controversies Between Citizens of Different States be Preserved?* 18 A. B. A. J. 499 (1932); Yntema, *The Jurisdiction of Federal Courts in Controversies Between Citizens of Different States*, 19 A. B. A. J. 71, 149, 265 (1933); Clark, *supra* note 91; Ball, *Revision of Federal Diversity Jurisdition*, 28 ILL. L. REV. 356 (1933); McGovney, *A Supreme Court Fiction: III*, 56 HARV. L. REV. 1225 (1943).

[94] See ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table 7 (1942); *id.* (1944) Table 6; *id.* (1946) Table C 2, p. 89; *id.* (1947) Table C 2.

[95] See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1923); Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 487 (1928); Frank, *Historical Bases of the Federal Judicial System*, this symposium.

[96] See, *e.g.*, Parker, *supra* note 93.

TABLE 2

DIVERSITY CASES IN DISTRICT COURTS BY NATURE OF SUIT, 1941-1947

	1941	1942	1943	1944	1945	1946	1947
Total diversity cases	7286	7135	5468	5233	5268	6242	8692
Contract actions:							
Insurance	1163	1156	953	1053	1099	1269	1454
Negotiable instruments	127	98	54	55	47	39	72
Breach of warranty	256	172	56	62	26	47	77
Other	1139	1209	1048	1012	969	1107	1654
Real property actions:							
Foreclosure	81	60	30	17	16	16	14
Other (except torts)	418[97]	411[97]	213	160	216	230	292
Tort actions:							
Personal injury, motor vehicle	1829	2010	1222	1034	1040	1368	2116
Personal injury, other negligence	....	....	1214	1220	1311	1504	2164
Personal property damage, negligence	....	....	64	38	56	65	107
Real property damage—all	....	....	51	100	83	162	141
Personal injury, non-negligence	....	....	161	183	151	161	229
Personal property damage, non-negligence	....	....	171	137	122	154	203
Personal injury, maritime	59	75	....	....	....	....	....
Personal injury, other	1155	1092	....	....	....	....	....
Other negligence	140	131	....	....	....	....	....
Unfair competition	83	41	....	....	....	....	....
Other tort actions	365	333	....	....	....	....	....
All other	471	347	231	162	132	120	169

case of other prejudices threatening administration of state justice, in state appellate processes—including, when due process is denied, review by the Supreme Court.[98] It is, indeed, a rather startling thought that this least troublesome of all the prejudices should be the basis of a special federal forum which none of the hostilities that flow from faction, interest, race, or creed is deemed sufficient to provide. But even if the prejudice hypothesis is thought to warrant federal intervention, it is quite plain that the diversity jurisdiction is not defined in terms that are responsive to the theory.

The jurisdiction holds though neither party is a resident of the state in which the action has been brought.[99] It holds upon removal based on "separable controversy," though when the case is taken as a whole citizens of the same state are on both sides.[100] It is not limited to cases tried by jury. A *bona fide* foreign domicile will

[97] The total given for these years includes torts.

[98] See, *e.g.*, Judge Denman's testimony on behalf of twenty-four circuit and district judges of the Ninth Circuit in support of S. 466, 79th Cong., 1st Sess., to abolish diversity jurisdiction except for removal by a non-resident defendant in a state court action upon a showing that "from prejudice or local influence he will not be able to obtain justice in such State court." *Hearing Before the Senate Judiciary Committee*, October 8, 1945. And see note 93 *supra*.

[99] In this respect the modern statute is broader than the Act of 1789, which limited the jurisdiction to the situation where "the suit is between a citizen of the State where the suit is brought, and a citizen of another State." See Warren, *supra* note 96, at 79.

[100] *See* Barney v. Latham, 103 U. S. 205, 212-213 (1880); *cf.* Note, 36 COL. L. REV. 794, 797-798 (1936): "Since under the 'separable controversy' statute the whole suit is removed to the federal court, the inquiry as to whether the citizen against whom relief is prayed is a necessary party to the adjudication of the controversy urged to be separable is really an academic one based upon the unreal premise that in case of removal some of the original parties to the suit would not be before the federal court."

give an individual foreign citizenship[101] whatever is in fact his contact with the state of litigation or his standing at its bar. Jurisdiction once attaching will survive though the parties have become united in their citizenship.[102] A few selected litigants with diverse citizenship will suffice for the determination of class suits[103] in which the major interests may be centered in one state. By the only outright legal fiction of importance that survives in modern jurisprudence, all the stockholders of any corporation are conclusively presumed to be citizens of the state of incorporation, with the result that a diversity exists when the corporation litigates with a resident of any other state, including, by the same token, a corporation organized under its laws.[104] If North Carolina residents operate a North Carolina business through a corporation organized in Delaware, all their controversies with their fellow North Carolinians may be litigated in the federal forum, provided only that they involve the jurisdictional amount.

The corporate anomaly is, of course, judicially created[105] and may yet yield to an attack in the Supreme Court.[106] Statistical analysis suggests that correction of this ancient and "malignant"[107] error would reduce by 70 per cent the recent volume of diversity cases in the federal courts.[108]

Enough has been said to indicate the nature of the issues that demand consideration in this area. They have been given scant attention in the bill. It will increase the federal litigation on negotiable instruments by eliminating the provision[109] requiring diversity between the plantiff's assignor and the defendant, though no assignment that is merely colorable will suffice to create jurisdiction.[110] Pursuant to the policy of the amendment passed in 1940,[111] residents of the District of Columbia and the territories will be treated as citizens of states—an extension that involves

[101] *See* Morris v. Gilmer, 129 U. S. 315, 328 (1889).

[102] Mullen v. Torrance, 9 Wheat. 537 (U. S. 1824). For discussion of the jurisdictional significance of changes in citizenship or parties after action brought, see Schlesinger and Strasburgher, *Divestment of Federal Jurisdiction*, 39 COL. L. REV. 595 (1939).

[103] Supreme Tribe of Ben-Hur v. Cauble, 255 U. S. 356 (1921). The requirement of complete diversity (Strawbridge v. Curtiss, 3 Cranch 267 (U. S. 1806)) is further circumvented by permitting intervention. See Stewart v. Dunham, 115 U. S. 61 (1885); see 2 MOORE'S FEDERAL PRACTICE 2413 *et seq.* (1938). Rule 19(b) of the Federal Rules of Civil Procedure recognizes as a reason for nonjoinder that an absent party's presence would defeat jurisdiction, a curious, partial repudiation of the policy of the jurisdictional rule.

[104] For the fullest account of this development, see McGovney, *A Supreme Court Fiction*, 56 HARV. L. REV. 853, 1090, 1225 (1943).

[105] See, *e.g.*, Marshall v. Baltimore & Ohio R. R., 16 How. 314 (U. S. 1854).

[106] The advocate who would launch the attack will find his arsenal in McGovney, *supra* note 104. For discussion of the counter-argument of Congressional acquiescence, see McGovney, *supra* note 104, at 1118-1124.

[107] The word is Charles Warren's, *supra* note 96, at 90.

[108] See Appendix, *infra*.

[109] Judicial Code §24(1), 28 U. S. C. §41(1) (1940): "No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted . . . if no assignment had been made."

[110] H. R. 3214, §1359.

[111] Act of April 20, 1940, 54 STAT. 143.

a major constitutional issue that should soon be resolved by the Supreme Court.[112] A removal would continue to be sanctioned when only a portion of a case involves complete diversity, but there is improvement in the formulation of the rule that governs in such cases and substantial gain in vesting in the district court discretion to remand the separable issues as to which diversity is incomplete.[113] In so far as venue rules now limit invocation of original jurisdiction, though not removal,[114] to cases where the plaintiff can effect service of process in the state of his or the defendant's residence,[115] a major change lurks in the draft. When venue is laid in a wrong "division or district" it is provided that the court "shall" transfer the case "to any district or division in which it could have been brought."[116] If this means what it says, a plaintiff need only file in any district where the process can be served and sit back to await the transfer of the cause. The result, if it is thought to be desirable,[117] would be achieved more satisfactorily by permitting process to run to any district but adhering to the rule that improper venue is cause for dismissal unless the point is waived.[118]

These are, however, small details in contrast to the program that is called for in connection with diversity. What is needed is a total reconsideration of the jurisdiction, guided by the principle that federal judicial energy should be preserved for vindication of those interests which, because the Congress has considered them of national importance, have become the subject of the federal substantive law. Within that sphere and that alone, federal courts can function as creative agents, the authorized interpreters of Constitution, treaty, and statute, the acknowledged sources of that subordinate and interstitial legislation which must come in any system from the courts. In many ways the worst part of diversity jurisdiction is that it debases the judicial process, reducing federal judges to what Judge Frank has

[112] H. R. 3214, §1359(3)(b). See Central States Cooperatives, Inc. v. Watson Bros. Transportation Co., Inc. (C. C. A. 7th Dec. 12, 1947) and National Mutual Ins. Co. of D. C. v. Tidewater Transfer Co., Inc. (C. C. A. 4th Dec. 31, 1947), both holding against validity of the 1940 amendment by divided court. The ultimate question is whether the provision can be viewed as a regulation of the District of Columbia when it is addressed to district courts sitting in the states and limits the right of a state citizen to litigate in its courts.

[113] H. R. 3214 §1441(c), *supra* note 85. The divorcement of diversity jurisdiction from policy is well indicated by asking what factors the court should weigh in exercising its discretion to adjudicate or remand, an answer that is fairly plain when jurisdiction rests on federal question.

[114] Lee v. Chesapeake & Ohio Ry., 260 U. S. 653 (1923).

[115] Judicial Code §51, 28 U. S. C. §112 (1940); FED. R. CIV. P., 4(f); see Camp v. Gress, 250 U. S. 308 (1919).

[116] H. R. 3214, §1406(a). Sub-section (b) provides: "Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue." *But cf.* §1693.

These provisions also apply to cases where diversity is not a ground of jurisdiction and the venue is generally only the district of the defendant's residence (§1391(b)), subject, however, to a growing number of exceptions. See, *e.g.*, 60 HARV. L. REV. 1173 (1947).

[117] See, *e.g.*, Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1, 21-24 (1945). *Cf.* H. R. 3214, §1963 providing for the registration of final judgments of a district court in any other district.

[118] Place of trial would still be subject to change under §1404(a), quoted *supra* note 28; see also Braucher, *supra* note 28; Comment, 56 YALE L. J. 1234 (1947).

called "ventriloquist's dummy to the courts of some particular state"[119]—because they lack the requisite authority to speak themselves. *Erie* v. *Tompkins*[120] was a necessary corrective of an act of usurpation,[121] but the federal system will be at its best when federal courts concern themselves primarily with federal law and there is smallest room within the range of their adjudication for the *Erie* doctrine to apply.

Re-examination of diversity may show, of course, that there are areas within the litigation that it brings to federal tribunals that should be made the subject of substantive federal legislation to be enforced by district courts. This was what happened when reorganization under Section 77 of the Bankruptcy Act supplanted the old equity receivership. Who will deny that the development, with legislation on the substance of the issues, represented an improvement in the law? The interstate interests that normally support diversity jurisdiction because they see advantage in a federal forum are all engaged in interstate commerce; if they have need for federal protection, the Congress sits to hear their case. Taft-Hartley shows what happens when the case is deemed persuasive. The enforcement of collective-bargaining agreements has not only been committed to a federal forum; it has become a right conferred by federal law. There are, as Mr. Justice Jackson has observed,[122] large fields of lawyer's law awaiting development by Congress under powers too long dormant, such as those conferred by the full faith and credit clause. Much that is now believed to be supported by diversity will in the end and far more reasonably be accomplished in this way.

There is, I think, a solid case for preservation of the jurisdiction in any instance where a concrete showing of state prejudice can be established.[123] There may be cases, too, where there is need for process that outruns state borders, as in the interpleader under present law.[124] I do not argue that diversity should not be utilized

[119] Richardson v. Commissioner of Internal Revenue, 126 F. 2d 562, 567 (C. C. A. 2d 1942). This is not to say that the role can be any different in so far as Congress chooses to adopt state law. It is to say that Congress has no choice in so far as the only basis for its action is the jurisdictional fact of diversity, unaided by any substantive Congressional power. See note 81 *supra*. Whether substantive federal legislation indicates adoption of state law is, of course, an issue to be faced in terms of the language and policy of the particular enactment. *Cf.* Vanston Committee v. Green, 329 U. S. 156 (1946).

[120] 304 U. S. 64 (1938).

[121] Those commentators who protest the constitutional language of Mr. Justice Brandeis' opinion seem to me to overlook or to dismiss too lightly the point made *supra* note 119. See Frankfurter, J., in Guaranty Trust Co. v. York, 326 U. S. 99, 101-102 (1945). It does not follow, of course, that every scrap in the state judicial larder must be relished by a federal court. That course will lead inevitably to misapplication of state law, in the strictest sense; for such scraps are often rejected in the state's own courts. See Clark, *State Law in the Federal Courts*, 55 YALE L. J. 267, 290-295 (1946); Note, 59 HARV. L. REV. 1299 (1946).

[122] See Jackson, *supra* note 117, at 21-23.

[123] *Cf.* S. 466, 79th Cong., 1st Sess., *supra* note 98. That such a provision can be meaningful is shown by the opinion of Circuit Judge Taft in City of Detroit v. Detroit City Ry., 54 Fed. 1 (E. D. Mich. 1893). So long as diversity is retained with general scope there is, however, too little function for the present local-prejudice ground of removal (Judicial Code §28, 28 U. S. C. §71 (1940)); and it is properly abandoned in the bill.

[124] 28 U. S. C. §41(26) (1940); FED. R. CIV. P., 22; H. R. 3214, §§1335, 1397, 2361; see Chafee, *The Federal Interpleader Act of 1936*, 45 YALE L. J. 963 (1936); *Federal Interpleader Since the Act of 1936*, 49 YALE L. J. 377 (1940); *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929 (1943).

to grant a federal forum on such principles. To do so is to premise federal intervention on a current finding of a state inadequacy. The problem is to limit intervention to the situations where it is in fact responsive to such need.

A program of this kind does not, it must be recognized, present solid political attraction. No major economic interest now feels outraged by diversity jurisdiction, as in the days when it was portion of the target in labor's fight against the federal injunction. And *Erie* v. *Tompkins* operates to keep down deep resentment founded on the overt nullification of state law.[125] Support must come, therefore, from the disinterested sources, the judiciary and the bar—including the law members of the Congress—content to view the issue in its right dimension as a problem of the uses of the federal courts. Such support may be forthcoming at a time when there is widespread interest in the organization of the federal government and the surrender of unnecessary functions now in federal hands.

Short of this major operation on diversity, there are, it seems to me, two smaller steps that should be taken promptly. The first is to revive Attorney General Mitchell's bill, proposed by President Hoover, to treat a corporation as a citizen of any state in which it is engaged in business for purposes of measuring diversity in its controversies with the residents of such a state.[126] This would remove the largest portion of the corporate anomaly. The second is to vest in district courts discretion to refuse adjudication whenever they find state law too uncertain to justify its application in a case that is not subject to the state appellate review. The Supreme Court has held against existence of discretion of this order, apart from cases covered by the special equitable doctrines, perceiving a compulsion to decision in the statutory grant of jurisdiction.[127] The compulsion ought to be removed. If federal courts are to engage in state administration, they should at least be free to abdicate the function when insufficient tools for its performance are at hand.[128]

V

RULES OF DECISION

The statutory mandate on state laws as rules of decision,[129] deriving from the first Judiciary Act, is limited in terms to "trials at common law." The bill would

[125] *Cf.* SEN. REP. No. 530, 72d Cong., 1st Sess. (1932).

[126] S. 937, 72d Cong., 1st Sess. (1932); SEN. DOC. No. 65, 72d Cong., 1st Sess. (1932). For earlier precedents, see FELIX FRANKFURTER AND JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 136-145 (1927).

The present bill (§1391(c)) provides that a "corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." The result reached in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165 (1939), where the corporation is defendant, will thus no longer be dependent on consent to suit required by state law. More significantly, when the corporation is a plaintiff it will be able in diversity cases to lay venue in any district in which it does business.

[127] Meredith v. Winter Haven, 320 U. S. 228 (1943).

[128] This would go far to meet the danger that state lower court doctrines, destined for extinction when the issue finally is faced on high, will in the meantime be the basis of irrevocable adjudication in the district courts. See Clark, *supra* note 121, at 292. The utility of the principle in other fields is indicated by Thompson v. Magnolia Co., 309 U. S. 478 (1940).

[129] REV. STAT. §721, 28 U. S. C. §725 (1940).

properly extend it to all "civil actions,"[130] for this is necessarily the situation. In so far as rights and duties have not been created by the federal law they must, if they exist at all, derive their being from state sources. The question when creation of such rights or duties is committed to the action of the federal judiciary is unaffected by the pending measure, which retains the substance of the vital qualifying language: state laws govern only in the "cases where they apply," and "except where the constitution, treaties or statutes of the United States shall otherwise require or provide." *Erie v. Tompkins* focuses attention with progressive emphasis on the meaning of these qualifications. The judicial exploration of that aspect of the problem[131] now points the way to further clarifying legislation within a portion of the field.

To a remarkable extent the federal substantive law defines powers without attention to resulting liabilities and prescribes rights and duties without also providing for their vindication or their breach. There is always room for question, therefore, whether Congress meant to relegate these matters to determination by the application of state legal systems or assumed, on the contrary, that the gloss would come from interstitial legislation of the federal courts, based upon their grant of jurisdiction. It seems plain now that the presumption is in favor of the federal judiciary in cases where the remedy invoked is equitable.[132] There may be more uncertainty where what is sought would formerly have been relief at law.[133] In neither case, however, should the answer be left merely to an implication; nor should the states provide the governing rule—unless the Congress has made clear in the particular area an intention to refer questions of remedies to state law.[134]

There should, therefore, be a companion section to that dealing with state laws as rules of decision. It should provide that for enforcement of all federal rights and duties the federal courts are authorized to grant all remedies afforded by the principles of law, unless an Act of Congress otherwise requires or provides. This would eliminate all doubt that courts of the United States administer a wholly federal jurisprudence in so far as they are dealing with the remedial consequences of the federal law, except in concrete situations where the Congress has provided otherwise. Within this area of federal jurisprudence, federal decisional doctrine would, of course, be binding on state courts when they administer the national law. This seems to be the plain intendment of the recent Supreme Court decisions.[135] The

[130] H. R. 3214, §1652.

[131] *See, e.g.*, Holmberg v. Armbrecht, 327 U. S. 392 (1946); Bell v. Hood, 327 U. S. 678 (1946); Guaranty Trust Co. v. York, 326 U. S. 99 (1945); Clearfield Trust Co. v. United States, 318 U. S. 363 (1943); Sola Electric Co. v. Jefferson Electric Co., 317 U. S. 173 (1942); D'Oench, Duhme & Co. v. F. D. I. C., 315 U. S. 447 (1942); Deitrick v. Greaney, 309 U. S. 190 (1940); Russell v. Todd, 309 U. S. 280 (1940); Board of Commissioners v. United States, 308 U. S. 343 (1939); *cf.* Note, 32 COL. L. REV. 688 (1932); Comment, 55 YALE L. J. 401 (1946); Snepp, *The Law Applied in the Federal Courts*, this symposium.

[132] See the clarifying analysis in Holmberg v. Armbrecht, *supra* note 131.

[133] *Cf.* Bell v. Hood, *supra* note 131.

[134] For an early effort to cope with the problem generally in an area of federal rights, see REV. STAT. §722, 28 U. S. C. §729 (1940). *Cf.* H. R. 3214, §§1346(b), 2672 (tort claims against United States).

[135] See note 131 *supra; cf.* Reitmeister v. Reitmeister, 162 F. 2d 691 (C. C. A. 2d 1947); Note, *Use of Common-Law Techniques and Remedies in Statutory Enforcement—A Study in Judicial Behavior*, 57 HARV. L. REV. 900 (1944).

doubts that still appear to envelop the issue should, it seems to me, be set at rest.

With this step taken, Congress will be brought to further systematic consideration of the extent to which it wills to leave these issues to a purely judge-made resolution or prefers itself to lay down the resolving rule. Why, for example, should the Code prescribe statutes of limitation for suits against the United States[136] but none for other situations where the right involved is federal and no special rule of limitations has been prescribed? Why should the federal law be silent as to when a damage action lies against a federal official[137] and when honest error in reliance on authority constitutes a good defense?[138] Why should Taft-Hartley leave uncertain the extent to which state rules of contract law are relevant in the enforcement of collective-bargaining agreements in the federal courts? Needless to say, what is involved goes far beyond the issue as to remedies that I have meant to pose. It takes in all the lawyer's law that rarely is articulated but always is assumed when Congress legislates in any special field. To bring this all within the legislative process is a large assignment. But despite the monumental strides of recent years, the nation's law will not have lost its fragmentary quality until the mission is performed.

CONCLUSION

The revision of the Code embodies major progress. I have tried to show the measure of the problems that remain. It may be wiser not to jeopardize the passage of the present bill by raising any of these questions. That is a judgment to be made by those who know the legislative situation. I urge no more than that we recognize how much remains undone; and that we undertake to do it when we can.

[136] H. R. 3214, §201.

[137] Bell v. Hood, *supra* note 131.

[138] *Cf.* De Witt v. Wilcox, 161 F. 2d 785 (C. C. A. 9th 1947), *cert. denied*, 68 Sup. Ct. 68.

APPENDIX

DIVERSITY OF CITIZENSHIP CASES TERMINATED IN 84 UNITED STATES DISTRICT COURTS DURING THE FISCAL YEARS 1942, 1943 AND 1944, BY NATURE OF SUIT AND RESIDENCE OF PARTIES, SHOWING THE NUMBER AND PERCENTAGE OF CASES IN EACH GROUP WHICH WERE REMOVED FROM A STATE COURT[130]

	Cases Terminated				Incomplete Information As To Residence	Total Cases Residence Of Parties Known	Plaintiff a Resident		Defendant a Resident		Both Parties Non-resident	Cases Involving Non-resident Corporation As a Party	
	1942	1943	1944	Total 3 Years			Defendant Non-resident Corporation	Defendant Other Non-resident	Plaintiff Non-resident Corporation	Plaintiff Other Non-resident		Number	Percent Of Total (Column 6)
TOTAL CASES	7,786	6,344	5,447	19,577	3,473	16,104	8,074	1,636	2,164	3,169	1,061	11,299	70.2
Removed Cases	3,188	2,337	2,111	7,635	895	6,741	5,205	947	65	111	413	5,683	84.3
Percent Removed	40.9	36.8	38.8	39.0	25.8	41.9	64.5	57.9	3.0	3.5	38.9	50.3	
Real Property	624	414	325	1,363	367	996	335	100	252	245	64	651	65.4
Removed Cases	159	122	90	371	75	296	204	58	8	12	14	226	76.4
Percent Removed	25.5	29.5	27.7	27.2	20.4	29.7	60.9	58.0	3.2	4.9	21.9	34.7	
Insurance	1,180	1,013	1,057	3,250	351	2,899	1,920	59	711	68	141	2,772	95.6
Removed Cases	595	500	569	1,664	143	1,521	1,406	19	15	4	77	1,498	98.5
Percent Removed	50.4	49.4	53.8	51.2	40.7	52.5	73.2	32.2	2.1	5.9	54.6	54.0	
Other Contracts	1,642	1,400	1,207	4,249	996	3,253	1,074	324	744	857	254	2,072	63.7
Removed Cases	431	323	262	1,016	195	821	592	98	24	24	83	699	85.1
Percent Removed	26.2	23.1	21.7	23.9	19.6	25.2	55.1	30.2	3.2	2.8	32.7	33.7	
Motor Vehicle—													
Personal Injury	1,992	1,535	1,130	4,657	508	4,149	1,925	884	79	1,030	231	2,235	53.9
Removed Cases	1,052	660	511	2,223	202	2,021	1,227	619	7	48	120	1,354	67.0
Percent Removed	52.8	43.0	45.2	47.7	39.8	48.7	63.7	70.0	8.9	4.7	51.9	60.6	
Other Personal Injury	1,311	1,171	1,189	3,671	480	3,191	2,238	152	56	504	241	2,535	79.4
Removed Cases	702	554	537	1,793	187	1,606	1,403	96	9	15	83	1,495	93.1
Percent Removed	53.5	47.3	45.2	48.8	39.0	50.3	62.7	63.2	16.1	3.0	34.4	59.0	
Other Tort	522	450	313	1,285	275	1,010	455	80	129	270	76	660	65.3
Removed Cases	188	141	119	448	70	378	311	35	2	6	24	337	89.2
Percent Removed	36.0	31.3	38.0	34.9	25.5	37.4	68.4	43.8	1.6	2.2	31.6	51.1	
All Other Diversity	515	361	226	1,102	496	6.6	127	37	193	195	54	374	61.7
Removed Cases	61	37	23	121	23	98	62	22	....	2	12	74	75.5
Percent Removed	11.8	10.2	10.2	11.0	4.6	16.2	48.8	59.5	....	1.0	22.2	19.8	

[130] This table was made available by the Administrative Office in response to a request for information on the working of diversity jurisdiction.

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